

A
Digest
OF
THE LAWS OF ENGLAND.

BY
THE RIGHT HONOURABLE
SIR JOHN COMYNS, KNIGHT,
LATE LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

(WITH CONSIDERABLE ADDITIONS TO THE TEXT)
AND CONTINUED
FROM THE ORIGINAL EDITION TO THE PRESENT TIME;
* * * TO WHICH IS ADDED,
A DIGEST OF THE CASES AT NISI PRIUS,
By *ANTHONY HAMMOND, Esq.*
OF THE INNER TEMPLE.

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A
D I G E S T
 OF THE
L A W S O F E N G L A N D.



. BAIL.

- (A) Bail; what shall be. p. 2.
- (B) Mainprize; what shall be. p. 3.
- (C) Pledge; what shall be. p. 3.
- (D) Caution; what shall be. p. 4.
- (E) Surety; what shall be. p. 4.
- (F) What persons areailable.
 - (F 1.) In criminal cases. — By the common law. p. 4.
 - (F 2.) Who are notailable by the st. W. 1. 15. p. 4.
 - (F 3.) Who areailable since the statute. p. 6.
 - (F 4.) Who may bail. p. 8.
 - (F 5.) Remedy for not bailing. p. 10.
 - (F 6.) For bailing when they ought not. p. 10.
 - (F 7.) What persons areailable in civil actions. —
 By the common law. p. 11.
 - (F 8.) By statute. p. 11.
 - (F 9.) Who not. p. 13.
 - (F 10.) Who may bail. p. 13.
- (G) The manner of taking bail.
 - (G 1.) In criminal cases. p. 16.
 - (G 2.) In civil actions. p. 16.
- (H) When bail shall be filed. p. 19.
- (I) Bail in an Habeas Corpus. p. 20.
- (K) What bail shall be sufficient.
 - (K 1.) In criminal cases. p. 21.
 - (K 2.) In civil actions. p. 22.

BAIL.

- (K 3.) When common bail. p. 23.
- (K 4.) When special bail. p. 30.
- (K 5.) Remedy for insufficient bail. p. 38.
- (K 6.) Remedy for refusing bail. p. 46.

(L) At what time bail shall be allowed. p. 46.

(M) How far the bail shall be liable. p. 47.

(N) To what they shall not be liable. p. 48.

(O) What will be a breach of the recognizance. p. 48.

(P) What not. p. 49.

(Q) How the bail shall be relieved. p. 49.

(Q 1.) By act of the court. p. 49.

(Q 2.) By surrender of the principal. — What shall be a surrender in due time. p. 51.

(Q 3.) What not. p. 55.

(Q 4.) How the surrender shall be recorded. p. 55.

(Q 5.) By the death of the principal. p. 56.

(Q 6.) If the debt be satisfied by the principal. p. 57.

(Q 7.) If it be released, or discharged. p. 58.

(R) Proceeding against bail.

(R 1.) By *scire facias*. — When it shall issue. p. 58.

(R 2.) In what manner the *scire facias* shall be sued. p. 60.

(R 3.) Pleas to a *scire facias*. — Surrender of the principal. p. 61.

(R 4.) No *capias ad satisfaciendum* against him. p. 62.

(R 5.) Death of the principal. p. 63.

(R 6.) Satisfaction by the principal. p. 63.

(R 7.) Demurrer for variance. p. 63.

(R 8.) *Nul tiel record*. p. 63.

(R 9.) By action of debt. p. 63.

(R 10.) Judgment. p. 63.

(R 11.) How execution shall be. p. 64.

(A) Bail; what shall be.

Bail signifies a guardian, or keeper, &c. 4 Inst. 178.

A man bailed is, where any one arrested, or in prison, is delivered to others, as his bail, who ought to keep him to be ready to appear at a time assigned, or otherwise to answer for him.

And

And therefore the bail may keep the person committed to them in their custody, for their indemnity. 4 Inst. 178, 179.

Or, if he be at large, they may reseize him, and bring him before a justice to find new bail, or to be committed to prison. Hal. P. C. 96.

And this they may do upon a Sunday. Mod. Ca. 231. Vide in Temps, (B 3.)

So, they may detain him in the Compter, &c. 'till by *habeas corpus* he can be turned over to the proper prison. Mod. Ca. 247.

And, if he be charged with a debt of the king in the Compter, this does not hinder his commitment to the proper prison, though the king opposes it. R. Mod. Ca. 247.

(B) Mainprize ; what shall be.

Mainprize is, where any one takes upon him to be surety for another, 4 Inst. 179. Hal. P. C. 96.

And therefore, every bail is mainprize, but every mainprize is not bail. 4 Inst. 179.

For a man may be mainperned, who never was arrested, or in prison. 4 Inst. 179.

As, in an appeal of felony, if the defendant wage battle, the plaintiff shall find mainpernors for his appearance, though he was not in prison. 4 Inst. 179.

So, if a man be mainperned in B. R. another cannot file a bill against him, as he may where he is bailed. 4 Inst. 180.

So, if a man in execution sue an *audita querela*, or a *scire facias* upon a release, &c. he shall find mainpernors, and not bail, because he is the plaintiff. 4 Inst. 179.

If mainprize is refused by the sheriff, &c. when it ought to be allowed, a writ *de manucapione* lies. F. N. B. 250.

Or, he may have a writ out of chancery directed to the sheriff, &c. to bail him. F. N. B. 250. G.

(C) Pledge ; what shall be.

A pledge is he, who undertakes, or is surety for another. 4 Inst. 180.

And therefore, every bail, and mainprize, *stricte loquendo*, is a pledge. 4 Inst. 180.

But a pledge is such as the demandant, or plaintiff finds, where the writ says, *si querens fecerit te securum de clamore suo prosequendo*; for then the plaintiff shall find pledges for the security of the king's amercement, if the plaintiff be nonsuited. 4 Inst. 180.

When pledges shall be found, and how. Vide in Pleader, (C 16, — 3 K 5.)

So, by the st^d W. 2. 2. there shall be pledges *de retorno habendo*, Vide 2 Inst. 340. 4 Inst. 180. Vide Pleader, (3 K 5.)

So pledges are said to be those who voluntarily are surety for another. 4 Inst. 180.

As, in *magna charta*, c. 8. *plegii debitorum non respondeant quamdiu capitalis debitor sufficiat*. 2 Inst. 19.

Pledges are those who plevy other things than the body of a man. 2 Inst. 19.

(D) Caution ; what shall be.

So in the spiritual court, caution shall be given.

And it is *juratory*, when a man makes oath in small offences *stare mandatis ecclesiæ*. 2 Lev. 36.

Fide-jussary, when he gives an obligation with sureties to do so. 2 Lev. 36.

Pignoratitia, when he gives pledges for the same intent. 2 Lev. 36.

But an obligation can be taken only upon a writ *de cautione admittendâ*. 2 Lev. 36.

(E) Surety ; what shall be.

Surety is a general word, which comprehends all the former. 4 Inst. 180.

And it shall be given by the common law, or by statute. 4 Inst. 180.

By the common law, upon a writ of *ne exeat regnum*. Vide 2 Inst. 40, 41.

Upon a *supplicavit* for the peace. Vide Forceable Entry, (D 16, 17.)

So, by the st. 34 Ed. 3. 1. upon default of good behaviour. (a)

(F) What persons are bailable.

(F 1.) In criminal cases. — By the common law.

In criminal cases, all persons were bailable by the common law, except for homicide. Hal. P. C. 97. 2 Inst. 42.

And the case of homicide was introduced by statute. 2 Inst. 186. 189.

If any one was indicted of felony, by an inquisition *ex officio* before the sheriff, bailiff of an hundred, &c. as he might be till restrained by the st. 28 Ed. 3. 4. and the sheriff refused to bail him, a writ *de manucaptione* lay to the sheriff, &c. F. N. B. 250:

But an obligation, for the enlargement of a man taken for treason, was void by the common law. R. 1 Lev. 209.

Or, for ease and favour to any one in execution for debt. 1 Lev. 209.

(F 2.) Who are not bailable by the st. W. 1. 15.

But now, by the st. W. 1. 3 Ed. 1. 15. sheriff, or others cannot (b) by writ, or without writ, bail (1) persons accused of treason, which concerns the king. 2 Inst. 189. Hal. P. C. 98.

Of counterfeiting the king's seal. 2 Inst. 188. H. P. C. 98.

Of falsifying money. 2 Inst. 188. H. P. C. 98.

Which were treasons by the common law, and since declared so by the st. 25 Ed. 3. 1. 2 Inst. 188.

(a) 1. It cannot be required from a libeller. 2 Wils. 151. — 2. Upon articles of the peace exhibited, court may require bail for such a length of time, as they shall consider necessary for preservation of the peace. 1 T. R. 696. — 3. And having fixed in the first instance a certain period, may afterwards, from circumstances, shorten it. Ibid.

(b) 4 T. R. 505. 2 H. B. 426. 435.

And it seems to comprehend all offences there declared to be treason. Nor persons taken by command of the king, or his justices, or justices of his forest.

A person committed by the personal command of the king, though it be illegal, can be bailed only in the superior courts at Westminster? 2 Inst. 187.

(2) Nor persons accused of arson feloniously done. H. P. C. 98. 2 Inst. 188.

(3) Of the death of a man, which is mentioned by the st. W. 1. 15. as an offence known not to be bailable before. 2 Inst. 186.

And therefore, a man is not bailable for murder. H. P. C. 98.

Nor, for manslaughter, or *se defendendo*, if he confesses the fact upon his examination. II. P. C. 99.

Or, if he be taken with the manner, so that it is apparently known that he killed another. H. P. C. 99. 1 Rol. 268.

(4) Nor persons accused of open offences; for the reason of bail is, that it is dubious, whether the party be guilty; but where he is notoriously guilty, he shall not be bailed. 2 Inst. 188, 9. H. P. C. 100.

(5) As, if he be outlawed: for he is thereby attainted of the felony. 2 Inst. 187, 8. H. P. C. 101. (c)

And by the same reason, if he be convicted by verdict, or confession. 2 Inst. 187. H. P. C. 101. 4 Inst. 178.

Or, if the *mittimus* mentions, that the felony was confessed upon examination. 4 Inst. 178. Per Haught. 3 Bul. 114.

Though upon the verdict *curia advisare vult*, whether he shall have clergy, &c. 1 Bul. 88. R. Dy. 179. a.

(6) So, if he has abjured; for such an one is attainted by his confession. 2 Inst. 187. H. P. C. 101.

(7) An approver; for he confesses himself guilty. 2 Inst. 188. H. 101.

(8) Those who are taken with the manner; for there the crime is manifest. 2 Inst. 188. H. 101.

And by the same reason, persons taken upon hue and cry. II. P. C. 101.

(9) Those who have broke the king's prison; for that is a presumption of guilt. 2 Inst. 188. H. P. C. 102.

(10) Thieves openly known and notorious. 2 Inst. 188. H. 102.

(11) Appellees by approvers, unless they are of good fame, 'till the approver dies, (or waives the appeal); for the confession of his own guilt induces a presumption of guilt in the appellee. 2 Inst. 188. H. 102.

Persons in execution. (d)

Or, punished by any statute with imprisonment for their offence.

(F 3.) Who

(c) One in custody upon a *capias nullatum*, after conviction of a misdemeanor, cannot be bailed without the prosecutor's consent. Burr. 2527.

(d) 1. Bail refused to defendant committed in execution for a fine imposed for a forcible entry, as he had brought and assigned error in person. Salk. 105.—2. Defendant was convicted for keeping an alehouse without a licence, and thereupon committed for a month pursuant to the act. After lying a fortnight, he brought a *certiorari*, and upon its return was admitted to bail, the court considering that if the conviction was confirmed, they could commit him in execution for the remainder of the time. Str. 530.—3. On a commitment in execution by a magistrate, the party cannot be bailed; thus on a commitment under the vagrant act for a time certain; though an appeal

(F 3.) Who are bailable since the statute.

But the st. W. 1. 15. which mentions sheriffs, gaolers, &c. does not extend to judges of superior courts; and therefore B. R. may bail in all cases, as for treason, murder, &c. at their discretion. 2 Inst. 185, 6. Hal. P. C. 98, 99. 104. R. 1 Bul. 85. 2 Jon. 210. Lat. 12. Sti. 116. 418. 2 Jon. 222. Pr. Reg. 64, 65, 67. 5 Mod. 323.

And by the st. 31 Car. 2. 2. if any committed for high treason, or felony, petition in open court the first week in term, or first day of sessions of oyer and terminer, or gaol-delivery, to be tried, and be not indicted next term or sessions, B. R. on the last day of term, or the justices of oyer and terminer or gaol-delivery on the last day of sessions, are required, on motion, to bail him, unless oath be made, that the king's witnesses could not be produced that term, or sessions. Vide in Habeas Corpus.

But the prayer must be the first week of the term in person, or by council; otherwise it is not necessary to bail him. R. 1 Vent. 346.

So the prayer ought to be the first week of the term for persons indictable in Middlesex; and for persons indictable in a county where B. R. does not sit, the first day of the sessions there; for the words shall be construed *distributive*. R. Sho. 190.

If bail be suspended by a subsequent act; the first week, &c. after that act is determined. 1 Sal. 103.

Bail in high treason, when a session passes without prosecution. 1 Sal. 103. (e)

When he has been a long time in prison, and his life is in danger. 1 Sal. 103, 104. (f)

So bail, upon murder found by the coroner's inquest; for the evidence appears. 1 Sal. 104. (g)

Otherwise, if a bill be found by the grand inquest. 1 Sal. 104.

There is no difference as to the bail of a peer, or a common person. 1 Sal. 104.

appeal is given to the quarter sessions. 2 T. R. 190.—4. One committed by house of commons for a contempt cannot be bailed by K. B. 2 Salk. 505.—5. Nor discharged. Ld. Rd. 1105. 3 Wils. 188. 2 Blk. 754. 8 T. R. 314.—6. Same law of a committal by the house of lords. 1 Wils. 299.—7. Or of any other court in Westminster Hall. Ibid.

(e) 1. Where four terms had passed, since the prisoner's commitment for high treason, and one assizes in the county, out of which, it had been hinted, the ground of complaint arose, and no prosecution against him, he was bailed. Str. 5.—2. Feme indicted for petit treason in murdering her husband bailed, it appearing upon affidavits, that the prosecution was malicious, and there not having been any proceedings for some time, either upon the indictment, or the coroner's inquisition. 3 Salk. 56.

(f) 1. To induce the court to bail from sickness, it must be a present indisposition arising out of the confinement. Str. 4.—2. Hence they will not bail where it is a family disease. Ibid.—3. Nor where the illness arises from the act of the prisoner. Ibid.—4. And they refused bail on account of illness to one committed for repeated forgeries, and the trial was very near. Leach, 138.—5. But allowed it to one convicted of a seditious libel, being very ill, before judgment. Str. 9.

(g) 1. Bail allowed on committal by the coroner for manslaughter, the depositions proving it to be no more. Str. 1242.—2. The depositions, not the inquest, are to guide the discretion of the court. Str. 211.—3. K. B. will not bail a gaoler committed by a justice for murder, by confining a prisoner in an unwholesome room, though he had previously been acquitted on four indictments for like offences. Str. 851.

Yet B. R. will not bail for treason, murder, manslaughter, &c. unless there be a reasonable cause. 1 Bul. 85. 1 Rol. 268. R. 3 Bul. 113. Dan. 678. R. 5 Mod. 455. Ray. 881. (h)

And therefore, after a conviction (i) of manslaughter they will not bail before clergy. 5 Mod. 288. 1 Sal. 103. (k) Yet there one was bailed, where there was no other question.

Or, after an indictment for murder upon an affidavit of the fact. 1 Sal. 104. Skin. 683. (l)

And now, persons accused of any offence, are bailable by all persons who have power to bail, where bail is not taken away by the st. W. 1. or any subsequent statute. (m)

And therefore, where a man is accused only of manslaughter, and *non liquet* that he committed the fact, he may be bailed. H. P. C. 99. Dub. per Twisd. 1 Vent. 93. (n)

So, where he is charged with giving a dangerous stroke, if the person be alive. H. P. C. 99. (o)

Or, with a misdemeanor only. 1 Sal. 104.

So, by the st. W. 1. 15. persons accused of command, force, or aid of a felony, shall be bailed. 2 Inst. 189.

Or, of receiving of thieves or felons. 2 Inst. 189.

And by equity, all accessories before or after are bailable. H. P. C. 100. (p)

But if the principal be attainted, and the accessory indicted, he shall not be bailed 'till he pleads to the indictment. H. 100.

So, by the st. W. 1. persons accused of larceny shall be bailed; which is intended, if they be of good fame, and not taken with the manner. Reg. 268. 2 Inst. 189. H. 100. Vide F. N. B. 249. G.

And by equity, those accused of burglary, or robbery. H. P. C. 100.

(h) 1. Bail allowed in rape, under special circumstances. 4 Burr. 2179. 1 Blk. 648. — 2. Though a warrant of commitment for felony be informal, yet if the *corpus delicti* appear in the depositions returned to the court, they will not bail, but remand the prisoner. 3 East, 157. Vide 2 East, 255. Leach, 544. 5 T. R. 169. Leach, 663. — 3. K. B. upon an application for bail will not form any judgment whether the facts amount to felony or not, but merely whether enough is charged, to justify a detainer of the prisoner, and put him upon his trial. The practice of the court being, that even when the commitment is regular, they will look into the depositions to see if there is a sufficient ground laid for detaining in custody; and if there is not, they will bail him: and where the commitment is irregular, yet if it appear that a serious offence has been committed, they will not discharge or bail the prisoner, without first looking into the depositions, to see whether there is sufficient evidence to detain him in custody. Leach, 105.

(i) A defendant convicted of a misdemeanor, brought up for judgment and remanded, cannot be bailed unless the prosecutor consent. 1 East, 159.

(k) Sed vide Id. 61.

(l) 3 Salk. 58.

(m) One committed for high treason in North America, who is only triable before the K. B., or under a special commission, cannot be admitted to bail, under the *habeas corpus* act, by justices of gaol delivery, or discharged by their proclamation for want of prosecution. 1 Leach, 187.

(n) K. B. has a right to bail in all cases of felony, even of murder, where they have any doubt either upon the facts of the case, or the law thereon. 3 East, 163. Leach, 138.

(o) Vide Str. 546.

(p) 1. Hence an accomplice in felony, the principal not having been taken, may be bailed. Loft. 554. — 2. The court however will not bail an offender who is willing to turn king's evidence, unless upon a full and fair disclosure of all he knows. Leach, 138.

So, persons accused of petit larceny only. 2 Inst. 189. H. 100.

Or, imprisoned for light suspicion, if they be of good fame. Reg. 83. 2 Inst. 189. H. 100.

And what shall be light suspicion seems to be in the discretion of the justices. H. 102. (g)

*So an appellee after the death of the approver, unless he be a known thief. 2 Inst. 190.

Or, after the appeal waived. 2 Inst. 188. H. 102. (r)

Or, in the life of the approver, if he be of good fame. 2 Inst. 188. H. 102.

So, for a trespass, for which he shall not lose life or member. 2 Inst. 189. H. 100.

And by the st. 23 H. 6. 10. a person in custody on an indictment of trespass.

And by consequence, for all crimes under felony, where bail is not taken away by any subsequent statute. H. P. C. 98.

As, for all misdemeanors. Mod. Ca. 179. (s)

(F 4.) Who may bail.

The justices of B. R. may bail in all cases at their discretion. Ante, (F 3.)

In an original suit before them by indictment, or appeal. Hal. P. C. 104. 1 Bul. 85.

Or, upon a commitment returned upon an *habeas corpus* or *certiorari*. H. 104.

So, upon an appeal by bill removed before them by *certiorari*. 1 Sal. 61. (t)

So

(g) The defendant was committed for a highway robbery, and applied to be bailed; the prosecutor attending insisted that he was the man; and though eight affidavits of credible persons proving an alibi were read, bail was refused. Str. 1157.

(r) 1. Appellee for murder acquitted on indictment, will be bailed. Str. 854. — 2. Unless judge is dissatisfied with acquittal. Ibid. — 3. Secus if not indicted. Ibid. — 4. Unless delay is imputable to appellant. Ibid. — 5. Secus too after conviction on indictment. Str. 858. — 6. Though pardoned. Ibid. — 7. And where on special verdict in an indictment for murder, defendant is pardoned, and his plea allowed, he is not compellable to give bail to answer the heir's appeal, though beyond sea and expected soon. Str. 1205. — 8. Appellee of murder convicted is not bailable without appellant's express consent. Str. 402.

(s) 1. Bail allowed on committal for a misdemeanor, in forging indorsements on exchequer bills. Salk. 104. — 2. Refused on committal till the assizes, pursuant to 13 & 14 C. 2. c. 11. s. 6. for a misdemeanor, in forcibly obstructing a custom-house officer in the execution of his duty. Burr. 2641. — 3. Nor can bail be demanded as of right. Ibid.

(t) By st. 48 G. 3. c. 58. whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information in the King's Bench, not being treason or felony, and the same shall be made appear to any judge of the same court by affidavit, or by certificate, of an indictment, &c. being filed against such person in said court for such offence, it shall be lawful for such judge to issue his warrant under his hand and seal, and thereby to cause such person to be apprehended and brought before him, or some other judge of same court, or before a justice of peace, in order to his being bound with two sureties, in such sum as in said warrant shall be expressed, with condition to appear in said court at the time mentioned in such warrant, and to answer all indictments, &c. for such offence; and in case any such person shall neglect or refuse to become bound as aforesaid, it shall be lawful for such judge, &c.
to

So the house of peers may bail a peer committed upon an indictment for murder; if the indictment be removed before them by *certiorari*. H. Skin. 683, 4.

So justices of gaol-delivery may bail in cases within their cognizance; as, if a man be convicted before them of homicide *se defendendo*. H. 105. Poph. 96.

Or, of homicide, and has a pardon to plead. H. 105.

So justices in eyre may bail. Poph. 96.

By the st. 1 R. 3. 3. every justice of peace may bail, but not before. R. Poph. 96. but this was repealed by the st. 3 H. 7. 3.

By the st. 3 H. 7. 3. two justices of peace (one quorum) may bail persons mainpernable by law, within their county, &c. till the next sessions or gaol-delivery, where they must deliver the bail-piece on pain of 10*l*. F. N. B. 251. F.

And therefore, two justices may bail in cases within their cognizance. H. 105.

But one cannot bail. H. 105. But now, if one justice by his warrant can apprehend, one may bail. Mod. Ca. 179.

And by the st. 1 & 2 Ph. & M. 13. they can only bail persons bailable by the st. W. 1. 15. Poph. 96.

Nor those, except in open sessions, or by two justices (one quorum) present at the time of the bailment.

And after examination of the prisoner, and information of the fact and its circumstances; which bailment and examination they must certify at the next gaol-delivery. H. 105.

And justices of peace may bail before or after commitment to prison. H. 105. F. N. B. 250. G.

And after indictment, and process against the offender. H. 106.

Sheriffs and others might bail persons imprisoned upon an indictment before them. H. 106. 2 Inst. 190. F. N. B. 250.

So a constable might bail. Poph. 96.

But by the st. 1 Ed. 4. 2. all indictments before the sheriff or his officers shall be delivered to the next sessions of the peace, and they cannot arrest or proceed thereon, on pain of 100*l*.

Yet by the st. 23 H. 6. 10. the sheriff may bail upon an indictment for a trespass. (u)

So, upon an *homine replegiando*. H. 103.

But if the serjeant of the house of commons takes into his custody, by order of the house, persons accused of treason, &c. he cannot bail them. R. 1 Lev. 209. R. Hard. 464.

By the stat. 5 Ed. 3. 8. the marshal of B. R. shall not bail persons indicted, or appealed of felony, on pain of half a year's imprisonment and ransom. F. N. B. 251. I.

Who may bail in civil actions. Vide post, (F 10.)

to commit such person to the common gaol of the county, &c. where the offence shall have been committed, or where he shall have been apprehended, there to remain until he shall become bound as aforesaid, or be discharged by order of court in term time, or of one of the judges of said court in vacation; and the recognizance to be thereupon taken shall be returned and filed in said court, and shall continue in force until such person shall have been acquitted of such offence, &c. or, in case of conviction, shall have received judgment for the same, unless sooner ordered by the court to be discharged.

(u) Vide 4 T. R. 505. 2 H. Bl. 418.

(F 5.) Re-

(F 5.) Remedy for not bailing.

If bail be refused, when it ought not, a man may have a writ *de odio & atia*, directed to the sheriff, *quod inquiret, &c. utrum A. captus & detentus in prisona, &c. retatus sit odio & atia, &c.* 2 Inst. 55.

And, if upon such inquiry, it be found, that he was accused for malice, or was not guilty, or that it was *se defendendo*, or *per infortunium*, a writ goes to the sheriff *de ponendo in ballium* until *proximam assisam*. 2 Inst. 42.

And he shall be bailed to 12 mainpernors. Fleta 1. ca. 26. Sect. 3. 2 Inst. 42.

Or, he may have an *homine replegiando*, which lies *nisi captus sit per preceptum regis, aut pro alio recto quare secundum consuetudinem Angliæ non sit replegiabilis*. 2 Inst. 55. Reg. 77. b. F. N. B. 66. E.

So upon an habeas corpus in B. R. the court may bail him, though there was a sufficient cause for his commitment. 2 Inst. 55. Vau. 156.

So, if a sheriff, bailiff, &c. refuse to bail upon offer of sufficient surety, when the man is bailable, he shall be amerced.

So, if a justice of peace refuse to bail, he shall be fined. Mod. Ca. 179.

And he was finable by the common law.

So, if a sheriff, &c. refused bail where he ought not, a writ *de manucapione* founded upon the st. W. 1. 15. went, commanding him to bail. F. N. B. 249. G. H. P. C. 103.

But now, by the stat. 28 Ed. 3. 9. all writs or commissions to the sheriff, to indict or deliver, are taken away, and consequently the writ of mainprize. H. 104. F. N. B. 250. A.

Remedy for not bailing in civil actions. Vide post, (K 6.)

(F 6.) For bailing when they ought not.

By the stat. W. 1. 15. if a sheriff(x), bailiff, &c. who has the keeping of a prison in fee, plevy any one not plevisable, he shall lose the fee, and the bailiwick for ever. Vide 2 Inst. 190.

If an under-sheriff, &c. does it, without the will of his lord, he shall have imprisonment for three years, and ransom.

If he takes money to deliver him, he shall restore double to the prisoner, and shall be amerced. Vide 2 Inst. 190.

By the st. 1 & 2 Ph. & M. 13. if a justice of peace offend against that act upon proof before justices of gaol-delivery, he shall be fined at their pleasure, though by the common law he was fined only 5*l.* as for a negligent escape. 4 Inst. 179.

And therefore, if he bail a man not bailable, he may be fined at discretion. 4 Inst. 179.

As, for bailing one taken upon an hue and cry, he was fined 40*l.* Hal. P. C. 101.

So, if he takes insufficient bail. H. P. C. 97.

(*) An attachment is grantable against a sheriff, for bailing a man upon an attachment which was not bailable.

So, if he bail a person not bailable, though it does not appear by the *mittimus* that he was not bailable. R. Poph. 96.

So the bailing of a person not bailable, will be a negligent escape. 1 Lev. 209.

(F 7.) What persons are bailable in civil actions. — By the common law.

By the st. W. 1. 15. and by the writ *de homine replegiando*, it appears, that a man detained in prison by the special command of the king, that is, by process out of a court of justice, (for the king can commit to prison only by his justices), shall not be delivered to bail by the sheriff. 2 Inst. 187. F. N. B. 66. E. 2 Sand. 60.

Nor, by justices of the forest. 2 Inst. 187.

So no court can bail a man, committed to perpetual imprisonment by judgment. R. Mo. 666.

And an obligation, for the enlargement of any one in execution for debt, was void by the common law. 1 Lev. 209.

But B. R. may bail in all cases at their discretion. Vide ante, (F 3.)

And therefore, upon error in B. R. of a judgment in B., if the defendant be in execution, though he is not bailable *de rigore juris*, yet by special grace he may be bailed. 2 Rol. 112. l. 50.

And if the error be apparent, he shall be bailed. R. Dy. 193. b. in marg. D. 2 Bul. 164. Adm. 1 Rol. 386. 2 Cro. 401. Vide post, (F 10.)

And if an error in law be assigned, he is usually bailed. Per Co. 3 Bul. 62.

Otherwise, if an error in fact. 3 Bul. 62.

Or, if there be error in parliament of a judgment in B. R. he shall not be bailed. 2 Rol. 112. l. 52. D. per Co. 2 Bul. 164.

Or, if there be error in the exchequer of a judgment in B. R. the exchequer cannot bail. R. 2 Cro. 108. Cro. El. 731.

And after the record removed into the exchequer, B. R. cannot bail. R. 2 Cro. 108.

So, if a defendant in execution sue an attain in B. R. he shall be bailed for cause, though it is not usually done. R. Cro. El. 5. Dy. 193.

Or, if he sue an attain in C. B. R. Dy. 193. b.

So, if he sue an *audita querela* upon matter in writing. Vide *Audita Querela*, (E 4.)

(F 8.) By statute.

But now, by the st. W. 2. 13 Ed. 1. 11. if an accomptant committed to prison be aggrieved by auditors, who will not allow his reasonable expences, &c. he shall be delivered to mainpernors.

By the st. 23 H. 6. 10. sheriffs and all their ministers may deliver to bail or mainprize upon sufficient surety, all persons arrested (y) by writ;

(y) 1. Yet an actual arrest seems unnecessary, to give validity to the bail-bond. 1 Str. 643. 444. Sed vide Noy, 43. — 2. But the issuing of process is essential. Say. Rep. 116. — 3. It is likewise irregular in an officer to take a bail-bond, before his warrant has been made out, or the writ, though issued, received by the sheriff. 8 T. R. 187.

bill, or warrant, in any personal action, so that they observe the day and place limited in such writ, bill, or warrant.

And, by the equity of this statute, they may bail upon an attachment out of chancery. Semb. 2 Vent. 238. 1 Vent. 234. R. cont. 3 Leo. 208. (z)

Or, process out of the dutchy court, or the court of wards. Semb. Cro. El. 647. (a)

So, in an attachment of privilege, upon a prohibition, or in process upon a penal statute. Per C. B. Mitch. 4 Geo. inter Field and Workhouse. (Reported Comyns's Reports 264.)

But persons cannot be bailed by the sheriff, who are not legally in his custody, but the obligation will be by duress, and void.

As, if the sheriff takes it upon an attachment out of the court of requests; for it has no authority to issue such process. R. Cro. El. 647.

So, if a man be arrested in the county of B. and afterwards carried to another county, and there gives a bail-bond to the sheriff of B; for such obligation of one out of his custody is by duress. R. Cro. El. 745. 2 Jon. 76.

So, if he gives a bail-bond, when taken upon an attachment (b) for a contempt. (c) R. in C. B. inter Field and Workhouse, Mich. 4 Geo. (Reported Comyns's Reports 264.) (d) For such obligation shall be taken at the peril of the sheriff. R. Sal. 608. (c)

By the st. 13 R. 2. 17. he in reversion, &c. on being received, &c. shall find bail to answer the issues of the land for the time he delays the demandant.

In an action in C. B. against a peer, he shall find bail. R. 2 Leo. 173. (f)

(z) 1. And upon demurrer to a declaration on such a bail-bond, the court will not presume that plaintiff had no authority to take bail, unless some case be made in pleading to it. 2 Blk. 955. — 2. Upon an attachment out of chancery for non-appearance, the common practice is to discharge the defendant on his giving bail in 40*l*. 1 H. Bl. 475. — 3. And perhaps the chancellor might punish the sheriff for refusing to discharge the defendant upon the offer of such bail. Ibid. — 4. But no action lies for the refusal. 1 H. Bl. 468. — 5. So that defendant's only course is to apply for relief to the chancellor, or a judge of the court out of which the process issued. 1 Str. 479. — 6. If the sheriff take bail, it seems he may be amerced if the party do not appear and answer. 2 Salk. 608. Ld. Rd. 722. — 7. Though in a subsequent case a messenger was sent, upon the sheriff's return of *cepi corpus*, to bring him in. Prec. Chan. 331. — 8. Which last course seems now to be the established practice. Tidd, 225, 6.

(a) But not upon process issuing upon an indictment at the quarter sessions: the sheriff must take a recognizance for appearance. 4 T. R. 505. 2 H. B. 418.

(b) The debt on a forfeited recognizance of bail to an attachment, is due to the king; and therefore cannot be applied in liquidation of plaintiff's demand. 3 Taunt. 112.

(c) 1. It is commonly said that the sheriff cannot take bail upon an attachment for a contempt. Cro. Car. 309. Com. 264. Str. 479. Barnes, 64. Blk. 955. — 2. But to this rule there are exceptions. — 3. He *may* take bail where the attachment is for nonpayment of money. Rex v. Aylett, 1 Tidd. 225. n. — 4. So he may take it on an attachment out of chancery upon *mesne* process. Sty. Rep. 212. 254. 2 Vent. 237. Com. 264. Barnes, 64. 2 Blk. 955. 2 Mars. 280. Sed vide 3 Leon. 208. contra. — 5. But not after a decree. Gilb. Rep. 84. Prec. Chan. 331.

(d) 1. Pr. Reg. 325. — 2. But a judge may. Ibid.

(e) A man is not bailable upon an attachment for disobedience to a mandamus.

(f) Sed vide 1 Inst. 151. 2 Inst. 50.

(F 9.) Who

(F 9.) Who not.

But by the st. 23 H. 6. 10. those are excepted, who are in custody upon condemnation, or execution. (g) And therefore shall not be bailed, though they bring writs of error. 1 Vent. 2.

Or, upon a *capias utlagatum*, or *excommunicatum*, who shall not be bailed by the st. W. 1. 15.

Or, for surety of the peace.

Or, by special commandment of the justices.

Or, vagrants.

And therefore, if a man be committed by the court, he shall not be bailed. 1 Rol. 134.

Or, by the chief justice. 1 Rol. 134.

So, if he be committed by the king's council. Semb. 1 Rol. 134. 219.

So persons, in custody of the serjeant of the house of commons, cannot be bailed by him. R. 1 Lev. 209.

Nor, persons in custody of the serjeant of the marches. 1 Lev. 209.

So B. R. will not bail, where there is no remedy for bringing the person back again into custody, if there should be judgment against him.

As, in error of a conviction for deer-stealing, a defendant in execution shall not be bailed in B. R.; for if the judgment be affirmed, there is no remedy to have the defendant in custody. R. 1 Sid. 286. 2 Keb. 43.

So in error upon an indictment, by a person in execution for a fine to the king, he shall not be bailed. 1 Sid. 320.

So in an *homine replegiando*, after an *elongatus* returned, the defendant being taken upon a *capias in withernam* shall not be bailed, unless he confess the taking, and the custody of the person. D. Ray. 475.

Yet a man in execution, &c. may be bailed in many cases in B. R. though not by the sheriff, &c. As, if he brings error, attain, *audita querela*, &c. Vide ante, (F 7.) Post, (F 10.)

So, if a man be taken upon an *excommunicato capiendo* by the st. 5 El. 23. he shall be bailed by B. R. though not by the sheriff, &c. R. 1 Bul. 122.

And if he offers caution to the bishop *ad parendum mandatis ecclesie*, a writ shall go to the bishop to take the caution, and deliver him; and if he does it not, a writ goes to the sheriff to deliver him. 2 Inst. 189.

So, upon an *excommunicato capiendo*, a man may be bailed, while the return is under the consideration of the court. R. 1 Sal. 105.

Yet this is in the discretion of the court, and may be refused. 1 Sal. 106.

So, in error upon an indictment, it may be refused. 1 Sal. 106.

(F 10.) Who may bail.

The court of B. R. bail in all cases at their discretion. Ante, (F 3, 4.)

And therefore, in error before them of a judgment in C. B., if the

(g) 1. Vide supra, as to criminal cases. — 2. Bail it is said is not demandable upon an attachment for non-payment of costs, being in the nature of an execution. Loft. 305. Vide supra.

error be apparent, the plaintiff in error, though he was in execution, may be bailed. *Vide ante*, (F 7.)

So, in error of a judgment in Ireland. *Pal.* 286.

In error to reverse an outlawry. *Dy.* 195. b.

In error to reverse an outlawry, in an appeal. 1 *Sid.* 316.

But after the record removed out of B. R. the court cannot bail. *R.* 2 *Cro.* 108.

So C. B. may bail in actions depending before them.

As, in an attain in C. B. by a defendant in execution, the court may bail. *Dy.* 193. b.

And bail is usually taken *de bene esse* (*h*) before a judge at his chamber. *Pr. Reg.* 73. (*i*)

And if the plaintiff does not except against it within 20 days following, it shall be filed and allowed as good. *Pr. Reg.* 68. *Ray.* 96.

And it shall be taken as good bail before filing, till disallowed by the court. *Pr. Reg.* 70.

And if the defendant does not file it, the plaintiff may. *Pr. Reg.* 73.

The proper filazer, or his clerk, attends the court, or a judge, when the defendant puts in his bail; otherwise, there shall be no bail. *Per Rule* in C. B. *Tr.* 1 *W. & M.* *Vide Rules and Orders of C. B.* 104.

But upon a writ of error out of B. R. the exchequer cannot bail; for they have no authority but to affirm, or reverse the judgment. *R. Cro. El.* 731. *R.* 2 *Cro.* 108.

So, after a writ of error upon a judgment by the barons brought in the exchequer chamber; bail to the error shall be taken by the chancellor and treasurer, and not by the barons. *Sav.* 31.

By the st. 4 & 5 *W. & M.* 4. justices of assize may take bail in any cause depending at Westminster, which shall be transmitted to one of the justices or barons of the court where the cause is depending.

(*h*) 1. Special bail are absolute or *de bene esse*. — 2. In civil cases, they cannot be taken absolutely, without the consent of the plaintiff, or his attorney. *R. M.* 1654. s. 8. *K. B. R. M.* 1654. s. 11. *C. P.* *Tidd*, 250.

(*i*) 1. In *K. B.* bail are put in before a judge in town at his chambers. — 2. And in actions by bill, their recognizance is taken by the judge's clerk, on a bail-piece, made out by defendant's attorney, and stamped with a half-crown stamp, stating the term, the county into which the writ issued, and the names of the parties, together with the names and additions of the bail, and the sum sworn to. *Tidd*, 247. — 3. In actions by original in *K. B.* special bail are put in before a judge in town with the filacer or his clerk, in the county where the action is laid; or if there has been a *testatum*, in the county into which the *copias* issued. 1 *East*, 603. *R. H.* 21 *G. 3.* *R. H.* 22 *G. 3.* 2 *B. & P.* 516. — 4. The defendant's attorney first making out and delivering to him a note in writing, answering to the bail-piece by bill. *Trye*, 67, 8. — 5. In *C. P.* bail should be put in with the filacer of the county into which the *copias* issued, who attends to take them at a judge's chambers. *R. T.* 1 *W. & M.* reg. 2. *C. P.* 2 *Blk.* 1061. 2 *B. & P.* 516. — 6. And on being furnished with an abstract of the writ, and the names and additions of the bail, he will make an entry thereof in a book kept for that purpose. *Tidd*, 248. — 7. Or bail may be taken in the absence of the filacer upon stamped parchment, upon bringing a true abstract of the writ. *Ibid.* — 8. The entry of bail in the filacer's book is of the term generally, which of course relates to the first day of it; and therefore in an action on a bail-bond, if the issue depend upon the date of the appearance, the court upon an application by the plaintiff, will order the day of appearance to be entered in the filacer's book, although issue has been already joined on the plea of *compervit ad diem*. 1 *Taunt.* 23. — 9. At the time of putting in special bail in both courts, plaintiff's attorney should deliver to officer with whom it is put in, a memorandum or minute of his warrant duly stamped. *Tidd*, 247, 8.

The

The sheriff may bail upon an *homine replegiando*. Hal. P. C. 109.

And by the st. 23 H. 6. 10. he shall let out of prison on sufficient sureties persons arrested, &c. viz. the sheriff, and all other officers, and ministers aforesaid. And before are named sheriff, under-sheriff, sheriff's clerk, steward, or bailiff of franchise (*k*), servant, or bailiff, or coroner.

* So the sheriff must bail a person arrested by process out of the sheriff's court in London. Cro. El. 77.

So the mayor, &c. of a corporation, any one arrested by process out of their court. R. Cro. El. 76.

If a man be arrested upon process out of an inferior court, the serjeant may take bail for his appearance. 2 Cro. 94.

But a mayor, &c. who is judge of the court, shall alone take bail to the action; for bail being matter of record must be taken by the judge of the court. R. Cro. El. 76. R. 2 Cro. 94. D. Cro. Car. 196.

Though it be said, that the bail before the serjeant was *secundum consuetudinem villæ*, it is not good. 2 Cro. 94.

Or, the party may have a writ to the sheriff out of chancery, to bail him. F. N. B. 251. B.

So the serjeant of the house of commons cannot bail. Semb. Hard. 464. Vide ante, (F 4.)

Nor the sheriff, upon an illegal process; as, upon an attachment out of the court of requests. R. Cro. El. 646. Vide ante, (F 8.)

By the st. 4 & 5 W. & M. 4. the justices of the respective courts of Westminster, or any two of them (whereof the chief justice to be one) may commission under the seal of the respective court whom they think fit, other than common attornies or solicitors, to take bail in any suit in the same court; which bail-piece shall be transmitted to one of the justices or barons of the same court, who on affidavit by one present at the taking, and fees, shall receive it as bail *de bene esse* before the justices or barons of the same court.

And such bail may be justified on affidavits taken before the same commissioners.

And the commissioners may examine the cognizors of such bail on oath of the value of their estates.

By rules upon this act, the affidavit of the bail being taken, may be before the justice to whom the bail is transmitted, or before a commissioner authorized by the statute to take affidavits in the same court. 5 W. & M. Vide Rules and Orders of B. R. and C. B. 82. 109.

And the bail-piece shall be transmitted to a justice of the same court, in B. R. within eight days, and in C. B. within ten days after the taking, if it be taken within 40 miles of London or Westminster; if it be above 40 miles, in B. R. within 15 days, and in C. B. within 20 days; or if the judge be in his circuit, presently after his return. Vide Rules and Orders of B. R. and C. B. 82. 109. (*l*)

(*k*) The sheriff cannot take bail for a person arrested by the *bailiff of a liberty* within his county. 2 T. R. 10.

(*l*) 1. It is said, that notwithstanding these rules, the bail-piece must actually be filed with one of the judges on the sixth day after the return of the writ in K. B., or the eighth day in C. B.; or the bail-bond may be assigned. Imp. K. B. 196, 7. Imp. C. P. 189. — 2. And where the action is by original, in the K. B. or C. B., the bail-piece being transmitted and allowed by the judge, should be filed with the filacer of the county where the action is laid. 1 East, 603. Imp. K. B. 594. 1 Crompt. 54. R. H. 6 G. 1, reg. 2. R. M. 13 G. 1. R. M. 6 G. 2, reg. 1. C. P.

And the commissioner must have a book, in which he shall enter the names of the defendant and his bail, and of the plaintiff, the time, and by whom transmitted; and in B. R. the name also of the defendant's attorney. Vide Rules and Orders of B. R. and C. B. 83. 110.

To which book the plaintiff or his attorney may resort, to inquire of the sufficiency of the bail. Vide Rules and Orders of B. R. and C. B. 83. 110.

But in C. B. a copy of the writ, whereon bail is required, must be written on parchment, and upon that the recognizance of bail engrossed. Vide Rules and Orders of C. B. 108.

And the plaintiff may except to the bail within 20 days after its being transmitted, and notice to him or his attorney of the taking. Vide Rules and Orders of B. R. and C. B. 83. 110.

And upon exception, the defendant must put in better bail, or the bail given must justify themselves in court by affidavit in court, or taken before a judge, or before the commissioner who took the bail. Vide Rules and Orders of B. R. and C. B. 83. 110.

(G) The manner of taking bail.

(G 1.) In criminal cases.

In the case of felony, the bail shall be bound by recognizance, each in a sum certain (*m*), and the principal in double, that the principal appear at the next sessions, or gaol-delivery, &c. *Et ultra quilibet eorum corpus pro corpore.* 4 Inst. 178.

If a prisoner be brought up upon a *capias* and *cepi corpus* returned, the bail shall be, that he appear *de die in diem et de termino in terminum quousque placitum terminetur et quilibet corpus pro corpore.* 4 Inst. 179. 1 Bul. 45.

But if the prisoner be bailed before the return of the writ, the bail shall be only bound in a sum certain, and not *corpus pro corpore.* R. 1 Bul. 45.

Bail for striking in Westminster-hall *sedente curia*, shall be body for body. (*n*) 1 Lev. 106.

What bail will be sufficient. Vide post, (K 1, &c.) (*o*)

Bail in an appeal. Vide Appeal, (F—G 4. 6. 9.)

(G 2.) In civil actions.

In personal actions the sheriff, &c. on an arrest shall take bail by obligation (*p*) in a reasonable sum, for the appearance of the defendant at the return of the process.

Who

(*m*) The st. 5 G. 2. c. 19. s. 2. is not satisfied by each of the sureties becoming bound in 25*l.* each. 8 T. R. 217.

(*n*) The meaning of which term is not that if the principal abscond, they are liable to the same punishment that he would have suffered: they are only liable to be amerced. Str. 211.

(*o*) 1. In criminal cases, no justification is requisite; the bail therefore is absolute in the first instance. 2 Blk. 1110. — 2. Nor is any precise time fixed for giving notice of bail. Ibid.

(*p*) 1. The st. 23 H. 6. c. 9. requires a security by bond or obligation. — 2. Therefore an agreement in writing made by a third person with the sheriff's officer, to put

Who shall be sufficient sureties. Vide post, (K 2.)

How an appearance shall be enforced. Vide in Pleader, (B 3.)

And a bond, to appear at the return of the writ, ought strictly to pursue the writ (*q*); otherwise, it is void, if there be a material (*r*) variance. R. 1 Vent. 233, 4. 2 Jon. 46, 138. Vide Pleader, (W 25.)

At

in good bail for the defendant at the return of the writ, or surrender his body to the officer, or pay the debt and costs, is void. 1 T. R. 418. — 3. So is an attorney's undertaking to the officer for defendant's appearance. 7 T. R. 109. 2 Smith, 52. — 4. Or to give a bail-bond to the sheriff in due time. 4 East, 568. — 5. The statute however only speaks of obligations given to the sheriff; and does not extend to such as are given to the party; therefore an undertaking by the defendant's attorney with the plaintiff, for defendant's appearance, is good, and will be enforced by attachment. 1 T. R. 418. 422. 4 East, 569. 2 Smith, 53. — 6. In the above cases then (where the security is void), if bail above be not duly put in, the sheriff is liable to an action for an escape. — 7. Nor will the court relieve him by permitting him afterwards to put in and justify bail. 7 T. R. 109. — 8. Or to surrender. 2 Mars. 261. 4 M. & S. 397. — 9. Nor after the plaintiff has recovered against the sheriff for the escape, will the court proceed summarily against the attorney, to make him pay the debt and costs for his breach of faith. 4 East, 568. 2 Smith, 52. — 10. Nor can the sheriff or his officer sue defendant for money paid when discharged without a bail-bond, and they, from his non-appearance, compelled to pay debt and costs. 8 East, 171. Peake, N. P. C. 143. 1 Esp. 333. — 11. The bond must be made to the sheriff. Dyer, 119, 20. 10 Rep. 100. Cro. Eliz. 800. W. Jones, 138. Palm. 378. 2 Lev. 123. Fort. 371. — 12. And by his name of office. Ibid. Tidd, 228. — 13. By 45 G. 3. c. 46. persons arrested upon *mesne* process may, in lieu of bail to the sheriff, deposit in his hands, by delivering to him, his under sheriff, or officer to be by him appointed for that purpose, the sum indorsed upon the writ, and 10*l*. for costs; to be paid by sheriff into court; and repaid to defendant on his perfecting bail; or on his neglect, then to plaintiff. — 14. On payment of money to sheriff on arrest, it will be presumed to have been paid under this statute, unless a discharge, or some acknowledgment in writing, be given to defendant for debt and costs. 1 Smith, 127. — 15. And where deposit is by third person, repayment, on bail being perfected, will be made to him. 1 Smith, 13. — 16. Defendant having put in, but not perfected bail above, and rendered in their discharge, is entitled to repayment. 3 M. & S. 283. 4 Taunt. 669. — 17. If defendant, being arrested by a wrong name, pay the deposit, without prejudice, payment to plaintiff, on defendant's omission to put in and perfect bail, will not be ordered. 5 Taunt. 623. — 18. Making this deposit cannot, in pleading, be described as giving bail. 4 Camp. 213. 1 Stark. 48.

(*q*) 1. The bond must be conditioned for defendant's appearance at the return of the writ, and for that only. Cro. Eliz. 862. 4 Bac. Abr. 462. — 2. Therefore it is void if single without any condition at all. Dyer, 119, 20. 10 Rep. 100. Cro. Eliz. 800. W. Jones, 138. Palm. 378. 2 Lev. 123. Fort. 371. — 3. Or with an impossible condition. 3 Lev. 74. 1 Str. 399. Fort. 363. 2 T. R. 569. — 4. Or the condition be not for the defendant's appearance. Dyer, 119, 20. 10 Rep. 100. Cro. Eliz. 800. W. Jones, 138. Palm. 378. 2 Lev. 123. Fort. 371. — 5. Or be for that and something else. Ibid. — 6. So if executed before the condition filled up. 3 Camp. 181. — 7. And where the objection is apparent upon the declaration, or upon oyer, defendant may demur, or move in arrest of judgment. 2 T. R. 569. — 8. Where it arises from extrinsic circumstances, these may be pleaded specially. Ibid. — 9. Or where it is that bond was executed after return of writ, may be insisted upon under the plea of *non est factum*. 4 M. & S. 338.

(*r*) 1. In the condition of a bail-bond it is sufficient to state, the time and place of appearance, and names of the parties; all other allegations are surplusage, and therefore, though misstatements, will not prejudice. 6 T. R. 702. — 2. So if the bond be, in its essential parts, substantially good, it cannot be avoided for any trifling informality, or variance of the condition from the writ, in the description of the plea, or of the time, or place, of appearance. — 3. Thus, where the writ was to answer the plaintiff in a plea of debt for 320*l*. or in a plea of trespass with an *ac etiam*, and the condition was to answer the plaintiff in a plea of debt or trespass generally, or without mentioning the plea at all, the variances were held immaterial. Cro. Jac. 286. 2 Lev. 123. 2 Show. 51. T. Jon. 137, 8. 6 Mod. 122. 10 Mod. 327. Atkinson v. Sanderson, Tidd, 229. n. Sed vide 2 Lev. 177. — 4. So where sheriff upon an original writ in a plea of trespass on the case on promises, took a bail-bond conditioned for the defend-

At the return of the process, the defendant shall give bail to the action.

If common bail is sufficient, he only files it; for it is no bail 'till filing. Pr. Reg. 73.

If special bail be required, the plaintiff may enter a *ne recipiatur* with the philizer, with whom the bail shall be filed. C. Att. 45.

If special bail be given in B. R. the bail are bound by the recognizance, (but not in a sum certain (s), that if judgment be given, and the defendant do not pay the condemnation, nor render himself to prison, *tunc debitum recuperatum sit* against the bail, &c. 2 Cro. 450. (t)

But in C. B. the bail is bound in a sum certain, to the value of the debt or damages in the writ (u). 2 Cro. 645. Cro. Car. 481. (x)

Yet the defendant himself need not be bound with his bail. R. 1 Sal. 3. (y)

In an account before auditors, the defendant shall be bailed, and the bail bound, that the defendant appear *de die in diem* before the auditors, and afterwards in court, and if he be found in arrear, that he pay, or render himself. Lut 49. 60. Cro. El. 82. Vide in Accompt, (E 8.)

If an action be removed by habeas corpus into C. B. the bail shall be

ant's appearance, to answer the plaintiff in a plea of trespass, the court held it valid. 6 T. R. 702. — 5. So where the writ in trespass was to appear before the lord the king at Westminster, and the condition was to appear before the justices of the king's bench at Westminster. 2 Lev. 180. T. Jon. 46. 2 Vent. 237. — 6. So where the writ, by original, was returnable before the lord the king, wheresoever he shall then be in England, and the words wheresoever, &c. were omitted in the condition. 2 Str. 1155 — 7. So where the condition, in an action by original, was for appearance before the king at Westminster. 9 East, 55. — 8. But a condition for appearance before his majesty at Westminster, is a fatal variance where writ is returnable before his majesty's justices of the bench, at Westminster. 2 Mars. 258. 6 Taunt. 551. — 9. And by the allegation, "his majesty's court of the bench at Westminster," the common bench must be intended. 3 M. & S. 166.

(s) 1. That is in suits by bill. — 2. In suits by original, the recognizance is taken in a penalty or sum certain, being double the amount of the sum sworn to. Trye, 121, 2. — 3. Or one thousand pounds beyond that sum, if it exceed one thousand pounds. R. M. 51 G. 3. K. B. 15 East, 62.

(t) 2 Bulst. 252. Cro. Jac. 645. Cro. Car. 481. 2 Salk. 564.

(u) Where defendant is held to bail under a judge's order, the recognizance must be taken in double the sum expressed in the order. 1 B. & P. 205.

(x) 1. In the exchequer, as in the other courts, if the debt sworn to exceeds one thousand pounds, the recognizance shall be in one thousand pounds beyond that sum. M. 51 G. 3. Wightw. 115. — 2. Previous to which regulation, and where the sum sworn to was large, the court have permitted more than two bail to be put in. Wightw. 110. — 3. Accordingly three bail were allowed to justify. Forrest, 138. — 4. But refused. 2 Blk. 1122. — 5. Notice that A. B. and C. or two of them will justify, bad in R. B., secus in C. P. Loft. 26. 2 Blk. 1122. — 6. Notice of three bail good. Id. 252. — 7. A recognizance given for one of two joint defendants, drawn up as in a cause against himself alone, is a nullity. 1 M. & S. 199. — 8. A recognizance of bail given in an action against two, in case the said C. and D. should happen to be condemned, is forfeited by the condemnation of either. 4 M. & S. 33. — 9. The validity of a recognizance duly given, does not depend upon the affidavits of sufficiency. 5 Taunt. 663. — 10. When a recognizance of bail in C. B. is put in suit in the exchequer, the plaintiff can have no advantage which he would not have had in the former court. 1 Anst. 47.

(y) 1. Formerly the defendant in the C. P. might have entered into the recognizance of bail himself, and in that case he was bound in double the sum sworn to, and each of the bail in the single sum only. R. 10 Mar. 5 W. & M. s. 1. 1 B. & P. 206, 7. — 2. But now he cannot; and the bail shall each of them enter into a recognizance in double the sum sworn to, or one thousand pounds beyond that sum, if it exceed one thousand pounds. R. E. 36 G. 3. 1 B. & P. 530. M. 51 G. 3. 3 Taunt. 341.

bound, that the defendant appear upon eight days notice and plead, and if he be condemned, that he satisfy, or render himself, &c. 2 Cro. 97. Vide post, (H—I.)

How bail shall be given in an *audita querela*. Vide *Audita Querela*, (E 4.)

By the st. 3 Jac. 8. in error of a judgment in debt on a single bond, or bond for payment of money, or in debt for rent, or any contract, no execution shall be stayed, unless the defendant be bound with two sufficient sureties in a recognizance of double the sum recovered, to prosecute the error with effect, and if judgment be affirmed, to pay the debt, damages, and costs of the former judgment, and also the damages and costs to be awarded for delay of execution.

And by the st. 13 Car. 2. 2. and 16 & 17 Car. 2. 8. in error in other actions. Vide for this in Pleader, (3 B 12.)

But if the plaintiff in error was in execution, the bail shall not be bound, that he render himself again in execution. R. Dy. 193. in marg. R. 3 Leo. 113.

Bail cannot be for part of a debt, but it shall be for the whole. 1 Bul. 107.

And if it be for the execution only, it shall be amended, and made bail for the judgment as well as the execution. R. 1 Bul. 107. 2 Cro. 272.

If bail for one defendant be in Michaelmas term, for another in Hilary, it shall be amended, and made of the same term; for the plaintiff cannot proceed upon a joint action against two defendants, upon bail filed in several terms. Lat. 183.

Vide ante, (F 10.)

(H) When bail shall be filed.

By the st. 5 & 6 W. & M. 21 (z) common bail shall be filed (a) within eight days (b) after the return of the process, upon pain of 5*l*. for which judgment and execution shall be immediately awarded.

And the defendant does not appear, 'till he files common, or special (c) bail. Vide in Pleader, (B 1.) (d)

And

(z) 5 G. 2. c. 27. s. 1.

(a) 1. In K. B. they are entered upon a piece of parchment, called a bail-piece. Tidd. 245. — 2. Which is stamped with a half-crown stamp. 48 G. 5. c. 149. 55 G. 5. c. 184. — 5. And filed with the clerk of the common bail; who is required to mark the bail-pieces numerically as they are received. R. E. 30 G. 5. 3 T. R. 660. — 4. In C. B. the appearance is entered with the filacer upon a *præcipe* of appearance being made out and delivered to him, on unstamped paper, which he enters in a book for that purpose. Imp. C. B. 216.

(b) 1. Which in K. B. are reckoned exclusively; and Sunday is not accounted as one of them. 1 Burr. 56. Tidd. 245. — 2. In proceedings by original, they are reckoned, not from the return day, but the *quarto die post*. Imp. K. B. 592. — 3. In C. B. they are reckoned from the return day, not from the *quarto die post*. Imp. C. B. 216, 17. Pr. Reg. 32. Tidd. 246.

(c) 1. Bail above are in general put in at or within a certain number of days after the return of the writ; but may be put in before for the purpose of surrendering defendant. 8 T. R. 456. Barnes, 81. 83. — 2. And where he is in custody, they are allowed for liberating him, after final judgment, and before he is charged in execution. Hill v. Staunton, Tidd, 252. n. — 3. In K. B. if defendant be arrested in London or Middlesex, special bail should be put in within four days exclusive; if in any other county,

And 'till he appears in B. R. or a *committitur* be entered upon the roll, the plaintiff cannot declare against him. Vide *ibidem*.

Nor, in C. B. 'till he files bail, or be brought into court by *habeas corpus*. Vide *ibidem*.

And by the course in C. B. where the action is removed by *habeas corpus*, bail shall be given before the action be depending in court. 2 Cro. 97, 98.

And if common bail be not filed, the attorney shall be punished. 1 Rol. 372.

And upon motion it may be entered, though the attorney be dead. 1 Rol. 372.

If common bail be not filed in eight days, upon producing the writ and return, and a certificate, that it was not filed, there shall be judgment for the 5*l.* without more, *nisi*, &c. 5 Mod. 392.

Yet if bail be filed in B. R. the last day of the term in which the bill is filed, it is good. R. Hob. 70. 1 Rol. 333. A. 2 Cro. 384.

And if no bail be filed, it is not error. R. Hob. 264, 5. R. cont. Cro. El. 894. R. acc. 2 Cro. 568. R. cont. Mo. 694. Semb. cont. Cro. El. 223.

If bail be filed in one term, and another added the next term, it shall be bail only of the last term. 1 Sal. 100.

Bail in an action upon an arrest shall be entered and filed in the office of the philizer, by whom the process was made. Comp. Att. 45.

Bail upon an *habeas corpus*, or writ of privilege, shall be entered in the prothonotary's office, from which the *habeas corpus*, or writ of privilege issued. Comp. Att. 45.

Vide *ante*, (F 10.)

(I) Bail in an *habeas corpus*.

Bail upon an *habeas corpus* shall be before declaration. R. 2 Cro. 97.

county, within six days after the return of the process. R. M. 8 Ann. 1. K.B.; former rule E. 11 W. 3. reg. 2. K.B. — 4. Or *quarto die post* by original. 4 T. R. 377. — 5. And if either the fourth or sixth day fall on a Sunday, the defendant has all the Monday following to put in bail. R. M. 8 Ann. 1. (b) K.B. 2 Str. 782. 914. — 6. But excepting Sunday, bail above may be put in on a *dies non juridicus*, as on the second of February, which is considered as a day for such business as is transacted at a judge's chambers. 5 T. R. 170. — 7. In the C. B. upon process returnable the first return of the term, special bail should be put in within four days, in London or Middlesex, or in any other city or county within eight days after the appearance day, or *quarto die post* of the return of the process, exclusive of the day on which it is returnable. 2 H. Bl. 276. — 8. But on process returnable the second or any other subsequent return of the term, special bail should be put in within four days in London or Middlesex, or in any other city or county within eight days exclusive after the return of the process, or day upon which it is actually made returnable. *White v. Girdler*, Tidd. 245. n. Imp. C. P. 196, 7. R. T. 50 G. 3. C. P. Imp. C. P. 173. 188. 196, 7. — 9. And in either court, if any farther time be required, for putting in bail, it may be obtained by taking out a summons for that purpose; and the judge will make an order, upon the terms of putting the plaintiff in the same state as he would have been in if bail had been put in in due time. Tidd. 245.

(d) 1. Common bail are particularly required in ejectment, for the casual ejector. R. T. 14 Car. 2. R. M. 33 Car. 2. — 2. And to authorize judgments by warrant of attorney, default, or *non sum informatus*. R. H. 1 W. & M. R. T. 4 W. & M. Tidd. 244.

If there be an habeas corpus to an inferior court in London, or within five miles, to remove a cause, the defendant ought, within four days after allowance of the writ, to give notice to the plaintiff, or his attorney, or such as enters the plaint, in writing, of the names and additions of the bail, and before what judge, and when it will be offered. Vide Rules and Orders of C. B. 16.

If the plaintiff or his attorney cannot be found, the notice shall be to the chief clerk in the inferior court, or his deputy; and there shall be an affidavit of this, before the bail be taken. Vide Rules and Orders of C. B. 16.

If there be no exception to the bail within 28 days after tender, upon an affidavit of notice, it shall be filed. 1 Sal. 98. Vide Rules and Orders of C. B. 16. which mentions 20 days.

And if it be not filed within four days after the 28, upon a certificate thereof, a *procedendo* shall be granted. Vide Rules and Orders of C. B. 16.

And where the habeas corpus is returnable *immediatè*, there shall be a *procedendo*, if bail be not given within eight days. Vide Rules and Orders of C. B. 16.

An habeas corpus to the courts of London, or other inferior court within five miles, may be returnable *immediatè*. Comp. Att. 46. Vide Rules and Orders of C. B. 15.

So, in all removals by habeas corpus, bail shall be given, if there was bail in the inferior court. Mod. Ca. 242. 1 Sal. 98.

So an executor, who has found bail in an inferior court, shall find bail, but not to pay the condemnation, but for appearance only, if the plaintiff declares within two terms. 1 Sal. 98.

But the bail in an inferior court will be good in a superior; for the party might have excepted to it there; except in London. 1 Sal. 97.

So an executor may be excused without bail, though the removal be by habeas corpus. Semb. 1 Sal. 98. 101.

Or, if the cause of action in the inferior court be vexatious. Semb. per Holt, 1 Sal. 101. But this is cause for diminution of the sum in which the bail are bound, not for excusing bail. 1 Sal. 102.

So, if bail is not given in eight days after the habeas corpus allowed, a *procedendo* shall be awarded by the barons at any time before bail.

Bail in an audita querela.—Vide Audita Querela. (E 4.)

(K) What bail shall be sufficient.

(K 1.) In criminal cases.

In criminal cases, the bail shall be in a sum certain, or *corpus pro corpore*. Hal. P. C. 97.

By the st. W. 1. 15. that shall be sufficient bail (c), for which the sheriff will answer.

And therefore, there ought to be two at least. H. P. C. 97. But usually there are four. Pr. Reg. 68. (f)

(c) Defendant's attorney may be his bail. Dougl. 467. n.

(f) As in felony; though it is in the discretion of the court to take fewer if they think them sufficient. Lofft, 29, 30.

And in felony they shall be subsidy-men. H. P. C. 97.

And the sum shall be 40*l.* at least. H. P. C. 97.

But a justice of peace may take money, as a pledge for the surety of the peace. Cro. Car. 446.

(K 2.) In civil actions.

By the st. 23 H. 6. 10. the sheriff, &c. shall let to bail, upon reasonable sureties of sufficient persons, having sufficient in the same county.

And therefore, the sheriff shall take sufficient sureties for his indemnity. Cro. El. 624.

Yet if he takes only one surety, it is good. Per Poph. Cro. El. 624. R. Cro. El. 672. 808. 852. 862. Cro. Car. 446. (g)

And if the bail swear that they are sufficient, and afterwards confess that they were not so in court, they shall be put in the pillory. Cro. Car. 146.

So, if the sheriff takes bail, who has nothing within the county; it is at his peril, and the bail stands. R. Cro. El. 808. 852. 862.

So bail, given to the sheriff, will be (h) sufficient bail (i) to the action. 1 Sal. 97.

The

(g) 1. 10 Rep. 100. 7 Taunt. 28. — 2. In like manner, a replevin bond executed by one surety, is nevertheless available against him. 2 Mars. 352. 7 Taunt. 28.

(h) 1. In K. B. if bail to the sheriff become bail above, plaintiff is not at liberty to except to them, *after he has taken an assignment of the bail bond.* 7 Mod. 62. 117. 6 Mod. 122. R. M. 8 Ann. reg. 1. (c). R. G. 5 G. 2. reg. 1. (a). K. B. — 2. But if exception be taken to the bail, *before the bond is assigned*, they are bound to justify, notwithstanding such assignment. 11 East, 321. — 3. In C. B. it is a rule, that in all cases where bail bonds shall be taken, and the same bail is put in above, the plaintiff may except against such bail. R. M. 6 G. 2. reg. 2. C. P. Barnes, 63. 2 Wils. 6.

(i) 1. The general qualification of bail above is, that they should be housekeepers, or freeholders; and respectively worth double the sum sworn to, or 1000*l.* beyond that sum if it exceed 1000*l.*, after payment of all their debts. Tidd. 250. — 2. But provided they are housekeepers, the rent of their houses is immaterial, though it be under 10*l.* Loft, 148. — 3. Nor is it necessary that they should have been assessed to the poor's rate. Id. 328. And a person occupying a house for a limited period, for which he pays neither rent nor taxes, is good bail. 2 Price, 8. — 4. And in C. B. the plaintiff may waive the qualification of the bail, being housekeepers or freeholders. 5 Taunt. 174. — 5. It is also a general rule, in both courts, that no attorney shall be bail in any action or suit depending therein. R. M. 1654. s. 1. R. M. 14 G. 2. reg. 1. K. B. R. T. 24 Eliz. s. 8. R. M. 1654. s. 1. R. M. 6 G. 2. reg. 5. C. P. — 6. Nor their clerks. Cowp. 828. Dougl. 466. Mason v. Caswell, Tidd. 251. n. 2 East, 182. Vide 1 H. B. 76. 2 H. B. 349. 1 B. & P. 356. 2 B. & P. 49. 564. 1 Taunt. 162. 164. — 7. But an attorney, or his clerk, has been allowed to become bail, in order to surrender defendant immediately, without justification. Tidd. 251. 2 Blk. 1180. — 8. So no person indemnified by defendant's attorney shall be bail. R. H. 17 G. 3. C. B. 1 B. & P. 103. Preston v. Bindley, Tidd. 251. n. — 9. Though indemnity from another person is no objection. 1 B. & P. 21. — 10. So no sheriff's officer, bailiff, or other person concerned in the execution of process, shall in either court be permitted to be bail. R. M. 14 G. 2. reg. 2. K. B. 2 Str. 890. 1 Barn. 417. Loft, 153. R. M. 6 G. 2. reg. 7. C. P. 2 Blk. 799. 2 B. & P. 150. — 11. A rule that has been applied to the keeper of the Poultry Compter. Dougl. 466. — 12. And Marshalsea court officers. Tidd. 251. — 13. But it is not a sufficient ground for rejecting a person as bail, in C. B., that he is described to be of A. in the county of B. *gaol-keeper.* 2 B. & P. 150. — 14. If a person who, by the rules of the court, is not permitted to become bail, is put into the bail-piece, and not excepted to, the plaintiff in the king's bench cannot take an assignment of the bail bond and proceed upon it, as if no bail had been put in. Dougl. 466. 2 East, 181. — 15. But in C. B. if an attorney be put in as bail, even though another person be afterwards added in his stead, the plaintiff

The court may accept money deposited, in lieu of bail. Pr. Reg. 66. (k)

But an infant shall not be accepted for bail. Pr. Reg. 68.

Nor a person who claims privilege; as, a tipstaff in chancery. 1 Sid. 68. (l)

(K 3.) When common bail.

The sum in bail, taken upon the st. 23 H. 6. 10. shall be proportioned to the cause of action. 1 Mod. 16.

By the st. 13 Car. 2. 2. the bail for appearance shall not be bound in a penalty above 40*l*. if the cause of action be not particularly expressed.

Before that, it might be to any sum the sheriff pleased. R. 2 Cro. 286.

And upon appearance, common bail shall be taken, unless the debt be above 10*l*. Pr. Reg. 72.

Or, in debt of a greater value, if the defendant be not taken, but surrenders himself upon the exigent. Sal. 496.

Or, appears upon a summons, attachment, or distress. 1 Mod. 236.

Or, upon a *supersedeas quia improvidè*.

So, by the st. 12 Geo. 29. (m) in any process, where the cause of action amounts not to the 10*l*. (n) and in inferior courts, where it amounts not to 40*s*.

Or, if it amounts to more, if there be no (o) affidavit (p) of the cause of action.

So

may treat the bail as a nullity, and take an assignment of the bail bond, or proceed against the sheriff. 1 B. & P. 356. 2 B. & P. 564. 1 Taunt. 162. 164. Jackson v. Hillas, Tidd. 252. — 16. If however the plaintiff except to the added bail, who thereupon justifies without opposition, the court will not set aside the rule of allowance. 1 Taunt. 162. — 17. Foreigners are not admitted to be bail, merely in respect of property abroad, not liable to the process of the court. 4 Burr. 2526, 7. Loft, 34, 147. Vide 2 Blk. 1323. — 18. Bail may justify in respect of personal property (money) in England, and real property (a house) abroad. 4 M. & S. 173. — 19. So a native of England in respect of property partly at home and partly abroad. Id. 371. — 20. Secus, if wholly abroad. Ibid. Forrest, 138. Vide 1 Blk. 444. 2 Blk. 957. 1523.

(k) 1. 1 Taunt. 425. — 2. Vide supra. p. 17. n. (p)

(l) Nor in C. B. can a peer or member of parliament. 4 Taunt. 249. 2 Mars. 252.

(m) 1. Amended by 5 G. 2. c. 27. — 2. Made perpetual by 21 G. 2. c. 3. — 3. And extended to inferior courts by 19 G. 5. c. 70—4.

(n) 1. By 51 G. 3. c. 124, no person shall be held to special bail, upon any process, issuing out of any court, where the cause of action shall not have originally amounted to the sum of fifteen pounds or upwards, exclusive of any costs, charges, or expences, that may have been incurred, recovered, or become chargeable in or about the suing for or recovering the same, or any part thereof, *except* where the cause of such action shall arise or be maintainable upon or by virtue of any bill of exchange or promissory note, when the party may be held to bail the same as before the act. — 2. Which statute does not avoid the proceedings where plaintiff arrests for fifteen pounds, and recovers less. 7. Taunt. 435. 1 B. Moore, 131. — 3. By 11 & 12. W. 3. c. 9, no sheriff shall hold any person to special bail, in Wales or the counties palatine, upon any process *issuing out of the courts at Westminster*, unless an affidavit be first made and filed of the cause of action, and that the same is *twenty* pounds and upwards; nor shall bail be taken for more than the single sum expressed in the affidavit.

(o) 1. But the statutes, except the limitation of the sum for which bail may be demanded, are not restrictive of any authority antecedently exercised by the courts, in respect to the holding to bail, but only of the act of the plaintiff. 8 East, 370. — 2. And as that authority was to receive affidavits sworn out of England, and verified here, for the purpose of making orders thereon to hold defendants to special bail. 8. Mod.

322. Barnes, 466. sed vide Str. 1209. 2 Burr. 655. — 3. So this practice has obtained since. 8 East, 364. — 4. And by the same reason, court or judge may order special bail in actions for unliquidated damages. Tidd, 167, 8.

(p) 1. The affidavit may be made by the plaintiff, his wife, or a third person. 1 Wils. 339. 1 B. & P. 1. — 2. And by one or by several persons. — 3. The affirmation of a quaker is sufficient to hold to bail. Cowp. 362; and see Willes, 292 n. — 4. And in C. B., an affidavit by a third person need not state any connexion between the deponent and the plaintiff. 1 B. & P. 1. 4 Taunt. 231. 5. But the affidavit or affirmation must be made by some person legally competent to be a witness, and therefore is bad if made by one convicted of any infamous crime. 5 Mod. 74. 2 Salk. 461. Barnes, 79. Pr. Reg. 49. Str. 1148. 2 Wils. 225. Sed vide Barnes, 116. — 6. The time, place of abode, and addition of every person making the affidavit must be inserted therein. R. 15 Car. 2. K. B. 1 East, 18. 330. 4 Taunt. 154. Vide 6 Taunt. 73. — 7. In K. B. however deponent may be described as "of the city of London, merchant." 3 M. & S. 165. — 8. So "gentleman of Chelsea," is sufficient. 2 M. & S. 475. — 9. And in C. B. the addition of "manufacturer" will do. 3 B. & P. 550. — 10. But K. B. will not try the real place of plaintiff's abode upon affidavits. Tidd, 182. n. — 11. Nor need defendant's addition or description be inserted. Ibid. — 12. Plaintiff's clerk being the deponent may state his place of abode to be the office where he is employed the greater part of the day, though at night he sleep at another place. 1 M. & S. 103. — 13. And a foreigner whose general residence is abroad, and who only landed here for a temporary purpose, may properly describe his place of abode to be in his own country, and not at the place where the affidavit was sworn. 3 East, 154. — 14. So where a deponent had been a few days before discharged out of prison, but by permission had still continued to lodge there at night, having no other place of residence, his describing himself *bonâ fide* as late of such a prison is well. 11 East, 528. — 15. But a deponent who has left one place of residence and resides at another, cannot regularly describe himself as late of the former. Ibid. — 16. The affidavit may be sworn before a judge, or commissioner of the court, authorized to take affidavits, by virtue of the statute 29 Car. 2. c. 5. or else before the officer who issues the process, or his deputy. 12 G. 1. c. 29. — 17. And it may be sworn before a commissioner, although he be concerned as attorney for the plaintiff. R. E. 15 G. 2. reg. 2. K. B. R. E. 13 G. 2. C. P. — 18. But a special capias issued upon an affidavit sworn at the bill of Middlesex office, is irregular. 1 M. & S. 250. — 19. There being no action depending in court, at the time when the affidavit is made, it ought not regularly to be entitled in a cause. — 20. And in one case, K. B. discharged the defendant out of custody on common bail, upon account of its being so entitled. 6 T. R. 640. Et vide Say. Rep. 218. — 21. But in a subsequent case, they thought, that as the practice had obtained so long of adding a title to affidavits of this kind, it would be too much to determine, that such practice had been erroneous. 7 T. R. 321. — 22. A rule of K. B., however, has since been made, that affidavits of any cause of action, before process sued out to hold defendants to bail, be not entitled in any cause, nor read, if filed. 7 T. R. 454. — 23. And in C. B., if an affidavit to hold to bail be entitled in a cause, it is bad; and defendant will be discharged on a common appearance. 1 B. & P. 56. 227. — 24. It need not be entitled as of the court. 7 T. R. 451. — 25. But in K. B., if it be not so entitled, but only subscribed with the words "by the court," at the bottom of the jurat, it is not sufficient. 3 M. & S. 157. — 26. Though where the name of one of the judges of that court is affixed to the affidavit, it will entitle the party to read it, as sworn in court. Id 157, 8. 15 East, 189. Sed vide 1 B. & P. 271. — 27. An affidavit made abroad, out of the king's dominions, is put upon the same footing as an affidavit sworn in Scotland or Ireland, which, though not sufficient of itself to authorize an arrest, will be a good ground for applying to the court or a judge, for an order to hold the defendant to special bail. 8 East, 364. — 28. Such an affidavit, however, ought to contain all the requisites that are essential to affidavits for holding to bail in England; and therefore it was deemed necessary to state in an affidavit made in Ireland, for the purpose of arresting the defendant in this country, that he had not made a tender in bank notes. 7 T. R. 376. 1 B. & P. 132. — 29. It has been said, that where an affidavit of debt is made in Scotland or Ireland, the party verifying it must swear, "that it was made by the plaintiff; that the hand-writing subscribed thereto is of his own hand-writing; that the said affidavit was made and taken before a magistrate who, deponent believes, had competent authority to administer an oath; and that the hand-writing of the person subscribing the said affidavit, is the hand-writing of such magistrate. 1 Sellon. Prac. 107. 1 Lee, Pr. Dict. 18. — 30. But in practice it is deemed sufficient, where the affidavit of debt is made in Scotland or Ireland, to swear to the hand-writing of the judge before whom it was made. — 31. And accordingly, where an affidavit of debt contained no place in the jurat, but purported to be

sworn before the C. J. of K. B. in Ireland, and to be signed by him, and such signature was verified by affidavit here; held, that it was a sufficient foundation for a judge's order. 1 M. & S. 302. — 32. Though if an affidavit of debt be made abroad, out of the king's dominions, it is usual to swear to the other circumstances before stated. 7 T. R. 251. Haydon v. Federici. Tidd, 185. n. 8 East, 364. — 33. The affidavit must be direct and positive, that the plaintiff has a subsisting cause of action; and therefore, if it be merely by way of argument, or reference to books or accounts, &c. or as the party making it believes, it will not in general be sufficient. 2 Str. 1157. 1209. 1219. 1226. 1270. 1 Wils. 121. 231. 279. 339. Say. Rep. 59. 2 Burr. 655. 3 Burr. 1447. 1687. 4 Burr. 2126. Brown v. Phepoe, Tidd, 185. n. 1 T. R. 716. 2 T. R. 55. 3 T. R. 575. 5 T. R. 364. Barnes, 87. Sed vide 3 Wils. 154. 2 Blk. 740. — 34. But an affidavit that defendant is indebted as plaintiff computes it, is good. 2 Burr. 1032. Sed vide 1 T. R. 717. — 35. And where plaintiff sues as executor or administrator, or as assignee of a bankrupt, it is sufficient for him, (or for a clerk of the testator. Etherington v. —, Tidd, 185. n.) to swear that defendant is indebted, as appears by books, and as he verily believes. 4 Burr. 1992. 2283. Brown v. Phepoe, Tidd, 185. n. 1 T. R. 83. 4 T. R. 176. 9 T. R. 419, 20. 2 B. & P. 298. — 36. But even in that case, a mere reference to books, &c. unsupported by the party's belief, is not sufficient. 2 Str. 1219. 1 T. R. 83. — 37. So an affidavit by an executor of a debt due to his testator, as appears from a statement made from the testator's books, by an accountant employed by the deponent, is bad. 1 Price, 402. — 38. A co-assignee of a debt, arising out of bills of exchange in his own possession, may sue in the name of the original creditor, and hold the defendant to bail on his own affidavit, swearing positively as to all the facts, which are within his own knowledge, and to the best of his knowledge and belief, as to such as are within the knowledge of his principal and co-assignees. 8 T. R. 418. — 39. And where the assignee of a bond swore, that the obligor was indebted in ninety pounds for principal and interest upon the bond, as he believed, the affidavit was deemed sufficient. 1 Wils. 232. — 40. But in such case it is usual for the obligee and assignee to join in an affidavit, stating the execution of the bond, the assignment of it, and how much is due for principal and interest. 2 B. & P. 355. — 41. The affidavit must be certain and explicit, as to the nature of the cause of action. — 42. Therefore, an affidavit, that the defendant is indebted to the plaintiff in such a sum, without more, is bad. 1 H. Bl. 10. — 43. Or generally upon promises. Dougl. 467. — 44. Or in so much upon a bond for performance of covenants. Say. Rep. 109. — 45. Or upon a breach of articles. Say. Rep. 109. — 46. Or as a balance of accounts between the parties. 4 Taunt. 154. — 47. So, that defendant is indebted to plaintiff for goods sold and delivered, not saying by plaintiff to defendant. 7 East, 194. — 48. Or for goods sold and delivered to defendant, not saying by plaintiff. 8 East, 106. 11 East, 315. 1 Mars. 535. 6 Taunt. 192. — 49. So, that defendant was indebted to plaintiff as secretary to the Tontine Society for money had and received to his use. 3 Anst. 791. — 50. So in K. B., that defendant, being captain of a ship, was indebted to plaintiff for work and labour of plaintiff done on board the ship, and for materials found by plaintiff and used therein, and for goods sold and delivered, and money paid by plaintiff, at defendant's request, was held defective, in not stating that the work was done, or money paid for, or the goods sold to defendant. 2 M. & S. 603. — 51. But in C. B., affidavit stating that defendant is indebted to plaintiff, for money paid, laid out, and expended, and wages due to plaintiff for his services on board defendant's ship, is sufficient, without expressly stating that the wages were due from defendant. 1 Mars. 317. 5 Taunt. 571. — 52. So affidavit that defendant is indebted to plaintiff for the hire of divers carriages of plaintiff to and for the use of defendant, is sufficient, without stating that they were hired of the plaintiff, or by whom they were hired. 2 Mars. 83. 6 Taunt. 389. — 53. So, that Randle Sutton (the defendant) is indebted to plaintiff for money paid to the use of the said Randle Jackson; for Jackson shall be rejected. 3 M. & S. 178. — 54. So, that defendant, is indebted to plaintiff in such a sum for money had and received on account of the plaintiff, not adding by the defendant. 8 T. R. 338. Vide id. 27. — 55. So, for money paid to use of defendant. 5 Taunt. 704. 751. 1 Mars. 315. — 56. Or for work and labour as defendant's servant; not adding, in either case, at his request. 5 Taunt. 756. 1 Mars. 317. — 57. So affidavit by a married woman, that defendant was indebted for the rent of lodgings, and for money lent by her to defendant, is sufficient, although it did not state to whom the lodgings were let, and the person making the affidavit was herself incapable of lending money; for she might have lent it as agent to her husband. Tidd, 187. — 58. In K. B. affidavit for bail on a bill is sufficient, though it do not state in what character plaintiff was, whether as payee or indorsee. 7 East, 94. 2 Smith, 117. — 59. So, indebted upon a bill, or order, for so much, drawn upon and accepted by defendant, payable to plaintiff. 8 T. R. 27. — 60. But

60. But indebted to indorsee of note *made* by defendant, without stating date, or that it was payable on demand, or at a day past, is insufficient in K. B. 2 M. & S. 148. 475. — 61. Secus had defendant been charged as *indorser*. 1 N. R. 157. — 62. So, that defendant is indebted to plaintiff on promissory notes of defendant, not stating how plaintiff became entitled to recover upon them, is defective. 1 Mars. 424. 6 Taunt. 25. — 63. So, that defendant is indebted to plaintiff as indorsee of a bill drawn by J. S. at a day now past, not stating in what character defendant became liable. 2 Mars. 231. 6 Taunt. 531. — 64. So, that defendant is indebted to plaintiff on a bill drawn by defendant upon and accepted by J. S.; and on another drawn by plaintiff upon and accepted by defendant, not stating dates, or that bills were due and unpaid. 2 Mars. 483. 7 Taunt. 171. — 65. So, that defendant is indebted to plaintiff in so much for interest-money, under and by virtue of an agreement under defendant's hand, is not sufficient. 10 East, 358. — 66. In holding to bail for stipulated damages for not performing an agreement, affidavit must state what the agreement was, and the breach of it. 6 T. R. 13. 2 East, 409. — 67. And as a party cannot be held to bail for a penalty, but only for the sum secured by it, any affidavit, stating that defendant is indebted to plaintiff in 1000*l.* under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c. which balance is still due and unpaid, is insufficient, without stating that the balance is 1000*l.* 6 T. R. 217. — 68. So affidavit that defendant is indebted in 50*l.* by virtue of an agreement whereby he bound himself in that sum for performing said agreement, and which he had neglected and refused to perform, without stating what the agreement was, or the breach of it. 2 East, 409. — 69. So if tenant bind himself in a penalty for performance of repairs within a certain time, and affidavit does not shew in what respect, or to what amount, he has violated his contract. 5 Taunt. 247. — 70. But in C. B. affidavit for damages awarded and costs taxed, is well enough. 1 B. & P. 365. — 71. But affidavit for money lent by plaintiff to defendant for the use of another, and for which defendant promised to be accountable, and repay or cause to be repaid or secured to plaintiff, &c. is bad, it not appearing but that security had been given. 5 T. R. 552. Vide 2 B. & P. 48. — 72. Formerly it was sufficient, in order to hold to bail in trover, to make a general affidavit, that defendant had possessed himself of divers goods and chattels of plaintiff, of the value, &c. which he had refused to deliver to plaintiff, and had converted the same to his own use. — 73. But an affidavit stating that defendant was indebted to plaintiff "in trover," is bad. 1 H. Bl. 218. — 74. So, that defendant had possessed himself of certain goods, &c. of plaintiff and of other persons. Tidd, 189. — 75. So, that the plaintiff's cause of action against the defendant was for converting and disposing of divers goods of the plaintiff, value 250*l.* which he had refused to deliver, though the plaintiff had demanded the same; and that neither the defendant nor any person on his behalf, had offered to pay plaintiff the 250*l.* or value of the goods. 7 T. R. 550. — 76. And to obtain a judge's order under the late rule, the affidavit should fully set forth the circumstances under which the defendant had possessed himself of the goods, the particulars of which they consist, the value of them, and in what manner defendant had converted them. — 77. And if a bill or note, it should be stated to be unpaid. 7 T. R. 321. — 78. An affidavit in trover by bankrupt assignees, that defendant possessed himself of the goods which he refused to deliver, and converted to his own use, as appears by the bankrupt's books of account and by the letter of S. (the agent) and letters of the plaintiffs, as deponent believes, is insufficient. 2 M. & S. 563. — 79. Affidavit on the lottery act must specify the nature of the offence, and aver that defendant has incurred the forfeiture. 1 T. R. 705. — 80. Though it need not detail the constituent circumstances. Ibid. 2 T. R. 655. — 81. Nor shew that plaintiff had authority to sue. 6 T. R. 640. — 82. Nor the sums or persons from whom they were received. 5 Anst. 862. — 83. That defendant insured or caused to be insured, is sufficient. 2 H. B. 17. — 84. And several offences of the same nature may be included in one affidavit. 4 T. R. 228. — 85. By the bank acts the affidavit to hold to bail must state that no offer has been made to pay the sum sworn to in bank of England notes, expressed to be payable on demand, fractional parts of the sum of twenty shillings only excepted. — 86. Which acts are construed to extend to affidavits made in Ireland to be used here. Nesbitt v. Pym, Tidd, 190 n. Stewart v. Smith, Ibid. 7 T. R. 376. 1 B. & P. 132. — 87. And if an affidavit be made here to be used in Ireland, it must negative the tender in Irish as well as English bank notes. — 88. Where the affidavit is made by the plaintiff, it must be particularly sworn that no tender or offer has been made, as required by the acts. — 89. And in K. B. an affidavit that *defendant* had not tendered the said sum or any part thereof in bank of England notes, was held bad. Tidd, 190. — 90. Secus in C. B. 1 B. & P. 344. — 91. So the omission of the word expressed is immaterial. 2 B. & P. 48. — 92. In affidavit for integral sum *and upwards*, negative of tender of *said* sum is sufficient.

So there shall be common bail, in debt upon a penal statute. R. Vel. 59. (g)

Or, in an information upon a penal statute, generally. Per Holt.

So, in debt, the defendant shall be discharged upon common bail, upon affidavit that 10*l.* is not due, if the plaintiff cannot deny it, or the plaintiff is in prison upon an escape warrant, &c. Mod. Ca. 63. (r)

So

cient. 2 East, 1. — 93. Secus of said sum and upwards. 3 East, 110. — 94. And where the sum has fractional parts of a pound, negative of tender of said sum, not adding, or any part thereof, is bad. 1 East, 17. — 95. If the affidavit be made by an agent, the plaintiff being abroad, it is sufficient to negative a tender, as the agent believes. 8 T. R. 284. — 96. So in an action by the corporation of London, for use and occupation, an affidavit by a clerk in the chamberlain's office as to the existence of the debt, and of no tender to the best of his knowledge and belief, will do. 1 East, 237. — 97. But in general, where the principal resides here, it is not sufficient for his agent to negative a tender to the best of his knowledge and belief. 8 T. R. 520. 2 East, 24. — 98. In the common pleas, affidavit to hold to bail, made by the plaintiff's agent is bad, though it expressly negative a tender. 2 B. & P. 339, 389. — 99. Unless it appear in the original affidavit, or in an explanatory one, that the agent had some particular reason for knowing that no tender had been made. 2 B. & P. 390, 420, 590. — 100. And in an action by the assignees of a bankrupt, it is not sufficient in that court for bankrupt to negative a tender. 3 B. & P. 219. — 101. But in K. B. an affidavit made by the agent of the plaintiff, expressly negating a tender to his principal as well as to himself, is sufficient, though principal be not therein stated to reside abroad. Maddox v. Abercromby, Tidd. 192. n. 1 East, 415. — 102. If the affidavit be made by one of several partners or assignees, a negative of tender to himself positively, and to either of his partners or co-assignees, to the best of his knowledge and belief, will do. 2 B. & P. 390. 8 T. R. 418, 520. 2 B. & P. 590. — 103. Nor semble is any negative of tender to intestate required of an administrator. 3 B. & P. 6. — 104. But in suits by bankrupt assignees, the negative must go as well to a tender to bankrupt before bankruptcy, as to assignees since; wherefore it is usual for bankrupt to join in affidavit. 8 T. R. 455. — 105. Now, however, these rules are in most cases unavailable for defendant, since by 45 G. 3. c. 18. s. 2. no defects in negation of tender shall avail to discharge him on common bail, unless he swear to tender of the whole sum, all in notes, or part in notes part in money, before he was held to bail. — 106. Which statute does not aid a total omission of negation of tender. Wood v. Jenkins. Tidd, 193. n. 2 Smith, 156. Vide 1 B. & P. 176. — 107. By 38 G. 3. c. 1. where affidavit for bail swears to a tender, court or judge may order defendant to deposit notes to the amount of the sum sworn to, to answer plaintiff's demand, and upon neglect and affidavit thereof, may hold him to bail. — 108. The affidavit must be single, therefore the joinder of parties, rights, or causes, that cannot be joined in one action, is irregular. 6 T. R. 688. 5 Burr. 2690. Dougl. 217. Fry v. Montgomery, Tidd. 194. n. 4 T. R. 577, 695. 5 T. R. 254, 722. 4 East, 589. 1 M. & S. 55. Barnes, 70. 1 B. & P. 49. 2 N. R. 82. 1 Mars. 274. — 109. If there be no affidavit, or it be defective, defendant will be discharged on common bail. 7 T. R. 375. — 110. So if it be not duly filed. 2 Wils. 225. — 111. So if the sum be not indorsed on the writ. 2 Wils. 69. — 112. But if the affidavit be merely informal, defendant cannot object to it, after having voluntarily given a bail-bond. 7 T. R. 375. — 113. Or put in. 1 East, 330. 1 M. & S. 250. 6 Taunt. 185. — 114. Or perfected bail above. 1 East, 81. 1 B. & P. 132. — 115. Or taken the declaration out of the office. 7 T. R. 451. — 116. Or pleaded to the action. 7 T. R. 376. n. Vide 1 East, 77. — 117. Or suffered judgment by default. 8 T. R. 77. 1 East. 19. n. Tidd. 181. 195. — 118. Affidavit more than a year old, will not warrant an arrest in K. B. 2 Str. 1270. Petcher v. Davy. Tidd, 196. n. Stewart v. Freeman. Ibid. 1 B. & P. 176. Tidd, 196.

(g) 1. Gilb. C. P. 37. Barnes, 80. — 2. Though special bail may be demanded in actions on certain remedial statutes. — 3. Thus for money won at play. 9 Ann. c. 14. 2 Str. 1079. 7 T. R. 259. sed vide 2 Wils. 67. — 4. So upon a statute which expressly authorises an arrest, as for exporting wool. 10 & 11 W. 3. c. 10. Com. Rep. 75. — 5. Double value for holding over. 4 G. 2. c. 28. 5 T. R. 364. — 6. Having unsealed wrought silks. 26 G. 2. c. 21. 3 Burr. 1569. — 7. Or insuring lottery tickets. 27 G. 3. c. 1. Tidd. 174.

(r) 1. A supplemental affidavit to supply deficiencies in, or a counter affidavit impugning

So, in error by an executor, of a judgment against his testator, he shall not find special bail within the st. 3 Jac. 8.

Or, of a judgment against himself. R. 2 Cro. 350. Cro. Car. 59. Litt. 3. 1 Sid. 183. Vide in Costs, (B.)

So, in an action against an executor, or administrator. Pr. Reg. 66. 3 Bul. 317. Yel. 53. Litt. 81. 2 Brownl. 293. (s)

Or, against an heir. 2 Jon. 82. 2 Lev. 204. (t)

Though it be upon an *habeas corpus* for removing the cause out of an inferior court. R. 1 Sid. 418. Cont. Litt. 81. 1 Lev. 245. But R. acc. 1 Lev. 268. 2 Lev. 204. R. 2 Jon. 82.

Or, against bail in another action. (u)

Or, against a privileged person; as, an attorney, &c. 1 Mod. 10. 2 Mod. 181. 2 Brownl. 134. Sal. 544. (x)

Otherwise,

pugning the original affidavit, is not allowable in K. B. 1 Salk. 100. 5 East, 169. 2 Str. 1157. 1 Wils. 355. Say. Rep. 55. 2 Wils. 225. 1 Blk. 192. 1 Burn. 655. 4 Burr. 2017. Dougl. 450. 467. Jacques v. Nixon, Tidd, 195. n. 1 T. R. 716. 5 T. R. 552. Spragg v. Young, Tidd, 195. n. 2 M. & S. 565.; sed vide 2 Blk. 886. 1 H. B. 501. — 2. Even therefore an affidavit of plaintiff's confession, that defendant owes him nothing, is inadmissible. 1 Wils. 355 — 3. Though an affidavit of a previous holding to bail, or a privileged exemption from arrest, is allowable. 2 East, 453. — 4. In C. B. where affidavit is defective from the omission of some circumstance necessary to complete it, a supplemental affidavit to supply the defect may be read. 1 T. R. 717. — 5. As where an executor omits to swear to his belief that the debt is due. 2 Blk. 850. — 6. Or that defendant acknowledged an account stated. Barnes, 100. and see id. 87. 1 H. Bl. 248. 2 B. & P. 299. — 7. So where the matter of bail is discretionary, as in an action for a malicious prosecution, the court, in determining whether an order shall be granted for special bail, will permit a contradictory affidavit. Ca. Pr. C. P. 149. Pr. Reg. 66. Barnes, 76. and see Pr. Reg. 65. Barnes, 61. Id. 72. 87. — 8. But supplemental affidavit will not be received, where original affidavit is a mere nullity, as being made by one convicted of an infamous crime. Pr. Reg. 49. Barnes, 79. — 9. Or does not contain any positive oath. 2 Wils. 224. — 10. Or cause of action. 1 H. Bl. 10. — 11. Nor will C. B. try the merits of the cause upon a contradictory affidavit, except where the matter of bail is discretionary. Barnes, 61. Pr. Reg. 65. Barnes, 109. Tidd, 195. 6.

(s) 1. Executors and administrators are privileged from arrest, where they merely act *en autre droit*, and have duly administered the effects of the deceased. Yelv. 55. Brownl. 295. 3 Bulst. 316. R. M. 15 Car. 2. K. B. R. M. 1654. s. 12. C. B. Gilb. C. B. 37. — 2. Not, therefore, where in writing, and in consideration of forbearance, he personally promises to pay a debt or legacy. 1 T. R. 716. — 3. Nor in debt on judgment suggesting a *devastavit*. 1 Sid. 65. 1 Lev. 59. Carth. 264. 1 Mod. 16. 1 Salk. 98. If it appear by affidavit or the sheriff's return, that he has wasted the effects. Comb. 206. 325.

(t) 1. Infant is not privileged. 1 B. & P. 480. — 2. Nor one insane. 4 T. R. 121. — 3. Nor will defendant, become insane since arrest, be therefore discharged. 2 T. R. 390.

(u) Vide infra.

(x) 1. The king, queen, and members of the royal family, are privileged from arrest. 2 Inst. 50. — 2. And the servants in ordinary of the king, or queen regent, though subject to a capias, ought not to be arrested even upon process of execution, without notice first given to and leave obtained from the lord chamberlain of his majesty's household. T. Rd. 152. 2 Keb. 3. 485. 5 T. R. 686. — 5. And a servant of this nature is not liable to be arrested, although the debt be contracted in the course of trade which he publicly carries on. 2 Taunt. 167. — 4. But the servants of the queen consort or dowager have no such privilege. 1 Keb. 842. 877. — 5. Seamen and soldiers are also under certain circumstances privileged from arrest. See 1 Geo. 2. st. 2. c. 14. Barnes, 95. 114. 32 G. 3. c. 33. 44 G. 3. c. 13. 11 East, 25. 52 G. 3. c. 34. s. 8. 37 G. 3. c. 33. 53 G. 3. c. 17. s. 114. — 6. Which privilege extends not merely to common soldiers and troopers in the life guards, &c. but also to non-commissioned or warrant officers. 1 Str. 2. Say. Rep. 107. 1 Str. 7. 1 Wils. 216.

1 Blk.

Otherwise, if an attorney be sued by original. 2 Brownl. 134.

So, where the damages are uncertain (y); as, in trespass, generally. Hans.^ds Intro. 2.

Action upon the case for slander; and, generally, in other actions upon the case. 1 Sid. 183.

Ejectment. Hans.^ds Int. 2.

Action for battery. 1 Mod. 2.

Or, in account, 'till judgment *quod computet*. R. 1 Lev. 300. except in special cases. Noy 28.

Or, in an action upon a bond given upon a replevin. 1 Sal. 99.

In a replevin, or *homine replegiando*, where the defendant appears before the *capias in withernam*. Sal. 582.

If he appears *gratis*, though an *elongata* be returned. Sal. 583.

And there shall not be special bail by reason of an *ac etiam*, where it is not requirable upon the merits of the cause. 1 Sid. 183.

So there shall be common bail, where the plaintiff was formerly nonsuited for default of a declaration. Per Holt.

Or, if the plaintiff does not declare within three terms after appearance. Pr. Reg. 65. 71. 1 Mod. 25. (z)

Common

1 Blk. 29. — 7. But not to commissioned officers, nor to soldiers imprisoned on any criminal account. 2 T. R. 270. 5 T. R. 156. — 8. Nor to volunteer drill sergeants, &c. 8 East, 105. — 9. Vide etiam 1 G. 2. c. 14. 32 G. 3. c. 33. 37 G. 3. c. 33. 29 G. 2. c. 4. 30 G. 2. c. 8. 1 Burr. 339. 466. Tidd, 205. 208. — 10. As to fugitives and insolvent debtors, see Tidd, 216, 17.

(y) Vide infra.

(z) 1. Defendant having been once arrested, cannot, in general, be arrested again for the same cause of action. R. M. 15 Car. s. 2. — 2. Thus where defendant was arrested on a writ taken out pending a prior action, wherein he had been previously arrested for the same cause, the court discharged him on common bail. 2 Str. 1209. — 3. And where the plaintiff, not liking the bail in the former action, obtained a side bar-rule for leave to discontinue upon payment of costs, and afterwards proceeded to charge the defendant in custody with a declaration in a new action; the court, conceiving this to be a trick, discharged the side-bar rule; so that the bail to the former action still continued liable. 4 Burr. 2502. — 4. But where it appeared that the bail in the prior action were foresworn, the court refused to assist the defendant, though he was arrested before the former action was discontinued; saying, the plaintiff was right in laying hold of him as he did, since had he discontinued, the defendant would probably have run away. 2 Str. 1206. — 5. And plaintiff, after suing out common process, may sue out a bailable writ for the same cause, and arrest defendant before discontinuing the first action. 6 T. R. 616. — 6. By a rule of Michaelmas, 15 C. 2. K. B. a defendant having been lawfully delivered from arrest, shall not again be arrested at the suit of the same plaintiff. — 7. But notwithstanding this rule, plaintiff may lodge a detainer against defendant in custody, upon mesne process, after his bail had justified, defendant not having completed his discharge, but being still within the prison. 3 M. & S. 144. — 8. Formerly, where plaintiff was non-processed for want of a declaration, he could not afterwards have arrested defendant in a second action for the same cause. Ld. Rd. 670. Com. Rep. 94. — 9. But now the rule is changed. Str. 439. — 10. So where plaintiff misconceived his first action, and discontinued in consequence, he may, after taxation and payment of costs, arrest *de novo*. Str. 1209. 3 M. & S. 153. 2 Wils. 381. Barnes, 399. — 11. And if the plaintiff be nonsuited, in an action of debt upon bond for not sufficiently proving the execution of it, on *non est factum*, defendant may be arrested in a second action. Barnes, 75. — 12. So where an action was brought against one of two partners for a joint debt, and defendant having been arrested thereon pleaded partnership in abatement; plaintiff was allowed, after entering a *cassetur bella*, arrest *de novo* in an action against both. Salisbury v. Whiteall. Tidd, 178. n. 1 Marsh. 395, c. — 13. And where plaintiff becomes bankrupt before interlocutory judgment, defendant may be arrested and held to bail by the assignees in a second suit for the same demand. Barnes v. Maton. Tidd, 178. n. — 14. Where

Common bail may be filed at any time before the roll be marked for special bail. Pr. Reg. 67.

(K 4.) When special bail.

But where the debt, or damages (*a*) in an action of debt, *detinue*, *tres pass*

14. Where second action appears to be vexatious, defendant will be discharged on common bail. 2 Blk. 809. — 15. So where defendant is arrested or detained in custody, after being superseded or supersedeable in a former action, by the laches of the plaintiff. 2 Str. 782, 945. 1039. 2 Wils. 93. Cowp. 72. *Cookson v. Foster*, Tidd, 178. n. Sed vide Barnes, 62. — 16. Even though the arrest be on a note given subsequent to the supersedeas. 2 Str. 1218. 8 East, 534. — 17. Or in a different form of action, if substantially the same. 3 East, 509. — 18. But where there are no laches in the plaintiff, and *à fortiori* where defendant is in fault, the court will not assist the latter. 6 T. R. 52. — 19. So where his discharge from custody was occasioned by a circumstance over which the plaintiff had no controul; such as an alteration in the warrant by the officer, under which the arrest was made. 6 T. R. 218. — 20. And where, in consequence of an appeal being dismissed, the defendant is held to bail, and the bail discharged by its subsequent revival; on a second dismissal, he may be held to bail again. 1 N. R. 13. — 21. So where defendant has been arrested abroad he may be again arrested here; at least where it does not appear that plaintiff may have the same redress and benefit by the proceedings abroad as in this country. 7 T. R. 470. 2 East, 453. — 22. An attachment and putting in bail thereon in the mayor's court is not equivalent to a personal arrest; so that the party may be held to bail in a court at Westminster for the same debt. 5 Taunt. 852. 1 Mars. 39. 5 Taunt. 851. — 23. So debt, upon judgment, whether after verdict or by default, defendant cannot be arrested, if previously arrested in the original action. 2 Str. 1039. 1218. Say. Rep. 43. Pr. Reg. 54. Ca. Pr. C. P. 32. Barnes, 116. — 24. Even though the bail in that action have since become insolvent. Say. 160. — 25. Or the plaintiff has released them, by declaring in a different county. 2 Wils. 93. Barnes, 116. Sed vide 2 H. Bl. 278. — 26. Or the defendant has surrendered in their discharge, and obtained a supersedeas. 2 Str. 1039. Cowp. 72. R. H. 8 G. 2. C. P. Ca. Pr. C. P. 34. Pr. Reg. 56. Barnes, 590. 1 B. & P. 561. — 27. And if a defendant, being arrested upon process of the K. B. give a warrant of attorney to confess judgment, and be afterwards holden to bail in the C. B., in an action upon that judgment the latter court will discharge him upon a common appearance. 2 B. & P. 416. Sed vide Barnes, 94. — 28. Yet, if defendant was not arrested in the original action, he may in that on the judgment. 8 T. R. 85. Pr. Reg. 55, 6. Ca. Pr. C. P. 32. Barnes, 116. 1 N. R. 133. — 29. Notwithstanding error brought thereon. Barnes, 71. Pr. Reg. 57. Com. Rep. 556. 2 Blk. 768. — 30. And if a cause in which defendant was arrested be referred, he may be arrested again in action for the sum (exceeding 15*l.*) awarded. 2 T. R. 756. — 31. Formerly the rule in K. B. was, that where the judgment was merely for costs upon a nonsuit, defendant could not be arrested either upon the judgment itself or upon a subsequent promise in consideration of forbearance. 5 Burr. 2660; but 2 Blk. C. B. 1274. contra. Cowp. 129. — 32. So where the debt was originally under 10*l.*, but raised to a larger sum by the addition of costs. 2 Stra. 975. 1077. 3 Burr. 1539. 4 Burr. 2117. — 33. So where the action was for general damages, which were reduced by the judgment to a sum certain above 10*l.* 2 Str. 1243. 1 Wils. 120. — 34. Yet it was afterwards determined in both courts, that a defendant might be held to bail in debt on judgment for 10*l.* for damages and costs, though the original debt alone was under that sum. 4 T. R. 570. Barnes, 432, 3. Pr. Reg. 60. Ca. Pr. C. P. 89. Sed vide Barnes, 433. Pr. Reg. 61. — 35. But now by 43 G. 3. c. 46. no person shall be held to bail for a cause not originally amounting to the sum for which such person is, by the laws now in being, liable to be arrested and held to bail, over and above and exclusive of any costs, charges, and expences that may have been incurred, recovered, or become chargeable in or about the suing for or recovering the same, or any part thereof. — 36. And by 51 G. 3. c. 124. no person shall be held to special bail, upon any process issuing out of any court, where the cause of action shall not have originally amounted to the sum of 15*l.* or upwards, exclusive of any such costs, &c. except where the cause of such action shall arise upon a bill or note, when there shall be special bail as if this act had not been passed. Tidd, 176. 181.

(*a*) 1. Where there is a certain *debt* to the amount of 15*l.*, or *damages* to that amount, which

pass for taking of goods, action upon the case (except for slander), amount to 20*l*. special bail shall be required.

So, in debt to 10*l*. (b) or more. Pr. Reg. 72.

So, in debt upon bond.

Though it be dated twenty years before. 1 Sid. 63.

Though there was a composition with other creditors, which binds the plaintiff, if well made; for perhaps it was not regularly made. 1 Sal. 99.

Though the obligation was by duress, or upon an usurious contract; for that shall be tried. 1 Sal. 100.

Or, for money won at play. 1 Sal. 100.

So, if a defendant be outlawed, special bail shall be required before error allowed for reversing it, by the st. 31 El. 3. R. Litt. 301.

But by the st. 4 & 5 W. & M. 18. special bail before reversal of the outlawry shall be required only where the court directs.

And if special bail was required before the outlawry, it shall now be so afterwards; otherwise, not. Sal. 496.

So, if an executor or administrator has been guilty of a *devastavit*. 3 Bul. 317. 1 Sid. 63. 1 Lev. 39. 245. 1 Sal. 98. 1 Vent. 355.

So, if there be a general judgment against an executor or administrator, and he brings error; he shall find special bail within 3 Jac. 8. R. 1 Sid. 368. 1 Lev. 245.

So, where a cause is removed by habeas corpus or certiorari, special bail shall be given. 1 Lev. 268.

Though the cause of action be of less value than requires bail in the superior court. 1 Lev. 268.

So, where the plaintiff has privilege; as, an attorney, &c. Pr. Reg. 68. But now an attorney that sues for fees shall not have special bail, if the cause of action does not otherwise require it. Pr. R. 74. By the st. 13 Car. 2. 2. upon an arrest by attachment of privilege, bail may be required above 40*l*.

So, where the damages are uncertain (c), the justices at their discre-

which may be reduced to a certainty, as in assumpsit or covenant for payment of money, bail is of course. Barnes, 79, 80. 108. — 2. So for a forfeiture in the nature of stipulated damages, given for the breach of an agreement. 6 T. R. 13. 2 East, 409. — 3. And under a contract of barter, if one party will state no account, the other may arrest for what he has furnished. 5 Taunt. 259. — 4. And formerly in actions of trover or detinue. 6 Mod. 14. Str. 1192. 1 Wils. 23. 335. Say. 53. Cowp. 529. Vide 2 Blk. 1018. 1 Wils. 335. Say. Rep. 53. — 5. But now by a late rule in all the courts, no person can be held to special bail, in trover or detinue, without a judge's order. 9 East, 325. 1 Taunt. 203. — 6. Bail cannot be required on an affidavit of debt for goods *bargained and sold*, not adding *delivered*. 12 East, 398. — 7. Nor in an action founded upon the prothonotary's allocatur for costs. 4 Taunt. 705. — 8. Nor upon a policy of insurance for a total or partial loss, without an adjustment or express promise to pay the amount. 5 Taunt. 201. 1 Mars. 19. 21. Vide 1 M. & S. 494. Tidd, 175. — 9. Nor on a contract made abroad not bailable there. 1 B. & P. 138. — 10. Nor where the legality of the demand is doubtful. Forrest, 153.

(a) Vide *supra*.

(b) 1. Where the damages are altogether uncertain, as in assumpsit or covenant to indemnify, &c. or in actions for a tort or trespass, there can be no arrest without a special order of the court or a judge, on a full affidavit of the circumstances. Barnes, 79. 80. 108, 9. 61. Pr. Reg. 63. Pr. Reg. 66. Ca. Pr. C. P. 149. — 2. Nor is it usual to grant such order, unless where there has been an outrageous battery or mayhem, or the defendant is about to quit the kingdom. R. M. 1654. s. 9. 12. Vide 2 East 453. 2 B. & P. 282.

tion

tion may grant special bail: as, in battery, if it appears to be outrageous. Pr. Reg. 72. 1 Sid. 276. 307.

In a conspiracy, or false imprisonment.

In slandering of a title; or *scandalum magnatum*. Ray. 74. 2 Mod. 215. R. 3 Mod. 41.

In other action upon the case. Semb. 1 Sid. 276. 1 Lev. 39.

In covenant, the bail shall be proportioned to the breach assigned. 1 Sid. 63. (c)

So, in debt upon bond for performance of covenants. 1 Sid. 63. 1 Sal. 100.

So, a prisoner discharged by the stat. of insolvent debtors, shall find special bail, if he be afterwards arrested for a sum above 100*l*. R. Mod. Ca. 301.

So, after a *capias in withernam*, if the defendant plead *non cepit*, he may be admitted to special bail. Sal. 581, 2.

So, if the principal does not appear at the return of the process, the bail-bond for appearance shall not be discharged, till special bail be given to the action. 1 Sid. 386.

So in debt upon a recognizance of bail, special bail shall be given. Per 2 J. 2 Mod. Ca. 237. (d)

By the st. 12 Geo. 29. in an action above 10*l*. the plaintiff shall (e) make affidavit of the cause of action, and the sum sworn to shall be indorsed on the process, and the sheriff shall take bail for no more. (f)

If the plaintiff requires special bail, he ought to give notice of it to the defendant's attorney. Pr. Reg. 70.

And notice by his attorney is sufficient, though the roll be not marked. Pr. Reg. 71.

And if no notice be given, nor the roll marked before common bail filed, special bail strictly cannot be required. Pr. Reg. 73.

And the marking the roll was only to shew the value of the action, which did not appear in the *latitat*; but now, since the st. 13 Car. 2. 2. it is not necessary; for it is now expressed in the *ac etiam*. Pr. Reg. 74.

And now, if it appears by the *ac etiam* that special bail is required,

(c) 1. A party cannot be arrested and held to bail for a penalty, but only for the sum secured by it. 6 T. R. 217. 2 East. 409. — 2. Or the damages actually sustained. Barnes, 109. Say. Rep. 109. Doug. 449. 1 Taunt. 247. — 3. Secus where the penalty is in the nature of liquidated damages. 1 Wils. 62. 5 Burr. 1351. 1373. Doug. 449. Vide Barnes, 86. sed vide Id. 108. — 4. Where there have been mutual dealings, the balance is the debt. 4 Burr. 1996. sed vide 2 Camp. 194. 5. Taunt. 259.

(d) 1. But the contrary is now settled. Tidd, 174. — 2. Nor can it be demanded in debt upon a bail. R. M. 8 Ann. (c) K. B. — 3. Or replevin bond. 1 Salk. 99. — 4. Whether brought by the sheriff or his assignee. 6 T. R. 336. 8 T. R. 450. — 5. Though after judgment had against the bail in such action, defendant may be arrested in an action on the judgment. Butt v. Moore. Tidd. 175. n. 8 T. R. 85.

(e) 1. This clause is merely *directory* to the sheriff; and does not avoid the bail bond, where there is no affidavit of the cause of action. 1 Burr. 330. Sed vide 2 N. R. 202. Semble contra. — 2. Or the sum sworn to is not indorsed on the writ. Ibid. — 3. Or even where the bond is taken in a penalty, double the sum sworn to. 2 Wils. 69. 1 Burr. 331. 1 H. Bl. 76. 2 B. & P. 109.

(f) 1. It is nevertheless the practice to take the bond in a penalty double the sum sworn to and indorsed. Cas. P. R. C. P. 43. Fort. 336. Prac. Reg. C. P. 67. sed vide 3 Blk. Com. 290. — 2. And the sureties thereon are liable to the full extent of the debt and costs, not exceeding such penalty. 2 Blk. 816. 1 H. Blk. 76. Tidd, 228.

the defendant, or his attorney, shall give notice to the plaintiff, or his attorney, of the names, abode, and vocation of his bail. Mod. Ca. 24. (g)

After notice, the plaintiff has 20 days to make exception to the bail. Mod. Ca. 24. 1 Sal. 98. (h)

IF

(g) 1. R. M. 16 Car. 2. K. B. — 2. Formerly the defendant's attorney was required to give notice of bail in the K. B. to the plaintiff's attorney, before it was put in. R. M. 7 Jac. 1. K. B. — 3. And the plaintiff's attorney, on such notice being given to him, was obliged to attend before a judge to accept of or except to the bail. R. M. 21 Car. 1. K. B. — 4. But notice of bail is not now given, until after it is put in; and though regularly it should be given before the time for putting in bail is expired, yet if it be not given in time, the plaintiff cannot after notice regularly take an assignment of the bail-bond. Tidd. 250. — 5. In the C. P. where bail was put in in due time, the defendant formerly was not bound to give notice thereof, but the plaintiff must have searched in the filacer's book; though it was otherwise, if they had not been put in in due time. 1 H. Bl. 529. — 6. But now notice must be given, from which time only is it considered as put in. R. E. 49 G. 3. C. P. 1 Taunt. 616. — 7. The form of the notice of bail in town is, that they are put in. — 8. Or if taken before a commissioner, that the bail-piece is filed, with an affidavit of the due taking thereof, at a judge's chambers. — 9. Or in actions by original in K. B. or C. B. that the bail has been allowed by a judge, and the bail-piece and affidavit are filed with the filacer. — 10. The notice in either case should be properly entitled. — 11. And where it is of bail put in, should set forth, with truth and certainty, their names, degrees, or mysteries, and places of abode, that plaintiff may have an opportunity of enquiring after them. — 12. Bail will be rejected for a false addition. 2 Taunt. 175. — 13. But the want of a description to the bail in the notice is cured by excepting to them. 1 Taunt. 17. Id. 18. n. — 14. The addition of manufacturer is sufficient. 3 B. & P. 549. — 15. A schoolmaster may be described as a gentleman. 5 Taunt. 759. — 16. Where bail is known by the addition of the younger, the notice will be insufficient unless that addition be given. 5 Taunt. 854. 1 Mars. 386. — 17. The parish wherein they live, without the street or other certain place of their residence, is too vague. Loft, 72. 194. — 18. Notice as of Hatton Street, not naming a parish, sufficient. Loft, 418. — 19. Description as of Clapham, insufficient. 5 Taunt. 175. — 20. Description as of his place of business sufficient. 1 Price, 400. — 21. Where the description of the residence of the bail is too general, the extent of the place of which he is described, must be represented to the court by affidavit. 5 Taunt. 554. — 22. If the bail above are the same persons as were bail to the sheriff, it is usually so expressed in the notice. Tidd, 251. — 23. The notice must be served on plaintiff or his attorney. — 24. And service on a plaintiff whose abode is unknown, and who has no attorney, may be by affixing the rule in the prothonotary's office. 7 Taunt. 145. — 25. In the exchequer all notices must be given and received, in the names of clerks in court; but in a case of bail, the court will, on an objection founded upon this rule, give further time to justify. 1 Price, 385.

(h) 1. In K. B. the exception to bail, if put in in due time, should be entered in the bail book at the judge's chambers by bill, or in the filacer's book by original, within twenty days after notice of bail put in or filed, and not afterwards. R. M. 8 Ann. reg. 2. (a.) K. B. R. E. 2 G. 2. K. B. R. M. 16 Car. 2. K. B. 1 Sal. 98. 6 Mod. 24. 2 East, 406. R. M. 8 Ann. reg. 2 K. B. — 2. If it be not entered within that time, the bail becomes absolute, and the bail-piece should be filed by the defendant's attorney, within four days after the end of the twenty days. R. M. 16 Car. 2. K. B. — 3. The exception being entered, notice thereof should be given in writing without delay to defendant's attorney. R. M. 8 Ann. reg. 2. (a.) R. E. 2 G. 2. R. E. 5 G. 2. reg. 1. 7 T. R. 26. 1 H. Bl. 80. 106. — 4. In C. B. it is a rule, that in all cases of exception to bail, such exception should be made, either in the filacer's book, or in the bail-piece, if taken by a commissioner, before it is transmitted, and afterwards above, in the filacer's book, or on the bail-piece. Cas. Pr. C. P. 33. 55. Barnes, 101. — 5. And notice of the exception must also be given in writing to the defendant's attorney. Barnes, 88. — 6. By the rules of both courts, every commissioner is required to have a book kept purposely for entering exactly the names of the defendant and his bail, and of the plaintiff, as it is in the bail-piece, and the time of the taking thereof, and the name of him by whom such bail shall be transmitted; and also in K. B. the name of the attorney for the defendant; and the plaintiff's attorney shall be at liberty to repair to the commissioner's book for the names of the bail, to the end that he may

If he does not except to, or does accept the bail, the attorney who put it in shall file it in 20 days after acceptance, on pain of 40s. By rule Trin. 13 Car. 2. B. R. Vide Rules and Orders of B. R. 26.

If (i) he takes exception, the defendant must (k) justify (l) them in court

inquire of the sufficiency of them; and if they are found insufficient, he may except against them, within twenty days after the said bail is transmitted, and notice to the plaintiff or his attorney of the taking thereof; and in that case the defendant must either put in better bail, or the cognizors of such bail must justify themselves in open court, either by affidavit taken before such commissioner that took the said bail, or by oath made in court, or before one of the judges of the said courts respectively. R. T. 8 W. 3. reg. 3. s. 4, 5. K. B. R. 10 Mar. 5 W. & M. s. 4, 5. C. P.

(i) If bail above be not put in in due time, they must be justified, though not excepted to. 7 T. R. 109. 7 East, 607.

(k) 1. Generally speaking, bail are not in a condition to make any motion to the court until they have justified. 7 T. R. 226. — 2. And when excepted to, are considered as no bail, unless they justify. 7 East, 580. — 3. And if they do not justify, court will order their names to be struck out of the bail-piece. Say. Rep. 58. 1 Wils. 337. — 4. But until this be done, they are liable to be proceeded against. Say. Rep. 398, 9. 1 Taunt. 427. — 5. And if it be not done until after proceedings have been had against them, they must pay the costs of such proceedings. 1 Blk. 462. 4 Burr. 2107. 7 East. 581.

(l) 1. In K. B., if notice of exception be given in term time, the defendant shall procure his bail to justify in four days exclusive after such notice, or shall add other bail, who shall justify within the said four days; but if such exception be entered in vacation, and notice thereof given in like manner, the bail put in, or other additional bail, shall justify upon the first day of the subsequent term. R. E. 5 G. 1. Reg. 1. K. B. R. T. 5 & 4 G. 2. C. P. — 2. In C. P. bail shall be perfected within four days after exception taken, in default whereof the plaintiff shall be at liberty to proceed upon the bail-bond. 2 Il. Bl. 35. — 3. And of these four days, the first is reckoned exclusively, and the last inclusively. 2 H. Bl. 35. 1 N. R. 159. — 4. Previous to the justification of bail, there should be a notice setting forth that the bail already put in will, on a certain day, justify themselves in open court, or that one or more will be added and justify themselves as good bail for the defendant. — 5. And if the bail were put in before a commissioner, that they will justify themselves by affidavit. — 6. But in the C. P. where bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification. 1 B. & P. 335. — 7. And in that court the want of a description of bail in the notice of justification is waived by the plaintiff's excepting to them. 1 Taunt. 17. — 8. In C. B. special bail are allowed to justify themselves in open court, although they did not actually become bail before the time that notice for their justification was delivered to the plaintiff's attorney or agent. R. M. 37 G. 3. C. P. 1 B. & P. 660. R. M. 18 G. 3. C. P. 1 H. B. 291. contra. — 9. It is held that they may even justify at any time before execution issues, though final judgment have been signed. 2 Mars. 374. — 10. Where bail has been put in by a wrong name, a misnomer in the bail-piece may be amended. 1 B. & P. 31. — 10. In K. B., where the bail already put in intend to justify, one day's previous notice of justification, or notice for the next day, is deemed sufficient, unless Sunday intervene, and then notice must be given on Saturday for Monday. Tidd, 256. — 11. But where other bail are added to those already put in, there must be two days previous notice of justification, one inclusive the other exclusive, as Monday for Wednesday, &c. Ibid. 9 East, 435. — 12. In C. B. two days notice must be given as well of justification of original, as of added bail. Barnes, 82. 88. 2 B. & P. 30. — 13. And Sunday is not reckoned a day for this purpose. Overton's case, Tidd, 256. n. Imp. K. B. 199, 200. Barnes, 303. — 14. If the time allowed for justifying expire on a day in term, which happens to be Midsummer-day, or any other holiday when the court does not sit, the notice should be for the day they ought to justify, to prevent an assignment of the bail-bond; and the bail may justify the next day, as a matter of course. Tidd, 257. — 15. Where bail above is put in, and exception entered in vacation, defendant's attorney in K. B. must, within four days after the exception, give notice of justification for the first day of the next term; or plaintiff may take an assignment of the bail bond. 9 East, 434. 1 Sel. Pr. 164. — 16. But it is otherwise in the C. P., where notice of justification may be given at any time in the vacation, so as there be two day's

court (m), or change them (n) within a convenient time upon notice; for the court requires an affidavit of notice, but there is no set time for it. Mod. Ca. 24.

Or,

day's notice before the first day of the next term. Barnes, 101. — 17. And in that court two days notice of bail is not required on an attachment, but reasonable notice is sufficient. 2 Blk. 1110. — 18. So where bail were put in in time, but did not come to justify pursuant to notice, and defendant's attorney gave a new notice for the next day, C. P. gave the bail leave to justify, in payment of costs of the first attendance. M. Cormick v. Foulger, Tidd, 257. Imp. C. P. 287. Tidd, 253. 257.

(m) The justification of bail is either in person or by affidavit. — 2. Where the bail are put in before a judge in town, whether by bill or original, they must personally appear in court, or by consent, before a judge at his chambers. 6 Mod. 24. R. E. 5 G. 2. reg. 1 (b) K. B. — 3. And in order to justify themselves, must swear that they are housekeepers or freeholders and respectively worth double the sum sworn to, or 1000*l.* beyond that sum, if it exceed 1000*l.* after all their debts are paid, or over and above all debts or demands due from them to any person or persons whatsoever; it not being sufficient for bail to swear they are worth a certain sum exclusive of their debts. 4 Taunt. 704. — 4. Bail put in before a commissioner must justify themselves in the same manner, where they live in London or Westminster, or within ten miles thereof. St. 4 & 5 W. & M. c. 4. s. 2. — 5. But where they live at a greater distance, they may be justified without their personal attendance, by affidavit duly taken before the commissioner of their being housekeepers, &c. Id. s. 2. R. T. 8 W. 3. reg. 3. s. 5. R. E. 5 G. 2. reg. 1 (b) K. B. — 6. This affidavit is usually annexed to the bail-piece, and a copy of it delivered to the plaintiff's attorney at the time of giving him notice of the bail-piece being filed; after which, if an exception be entered, which seldom happens, the affidavit must be produced and read in court, as a justification upon notice given thereof, and an affidavit of the service of such notice. Tidd, 267. — 7. In the king's bench where the same persons are bail in more actions than one, it is sufficient for them to swear that they are worth double the amount of the sum sworn to in that action. Ibid. — 8. But in the common pleas, the affidavit ought to state that they are worth double the amount of the debts in all the actions wherein they offer to become bail. 3 B. & P. 39. — 9. When the bail are to be justified in court, an affidavit must be made of the service of notice of justification, and delivered to counsel in the king's bench, or a serjeant in common pleas, with instructions for him to move to justify them. Tidd, 267. — 10. And the judge's clerk attending with the bail-piece or the filacer with his bail-book, they are allowed to justify as a matter of course, unless they are opposed by counsel *viâ voce*, or, if taken before a commissioner, upon cross affidavits. Ibid. — 11. For the purpose of taking the justification of bail, &c. one of the judge's of the court of king's bench sits during term-time, every morning at half-past nine o'clock, and no bail is permitted to justify after ten o'clock. R. T. 35 G. 3. K. B. — 12. And in the C. P. it is a rule that bail shall justify at the sitting of the court only, and at no other time, excepting the last day of term, when bail, who may have been prevented from attending at the sitting of the court, shall be permitted to justify at the rising of the court. R. M. 51 G. 3. 3 Taunt. 569. — 13. If bail justify in that court, without the observation of counsel instructed to oppose them, the court will not require them to come up again and justify *de novo*. 4 Taunt. 666. — 14. The common grounds of opposing bail are, first, that there is some defect in the form, or irregularity in the service, of the notice of bail or justification; secondly, that the persons offered are not personally qualified, or allowed to be bail; and, thirdly, on account of their insufficiency in point of property. Tidd, 268. — 15. In the common pleas, it is a rule, that a false addition to the name of the bail, shall be considered as a ground of rejection. 2 Taunt. 173. — 16. And bail by affidavit were rejected in that court, on the ground that one of them was described in the notice of justification as A. B. generally; but in the affidavit of justification, as A. B. the younger. 1 Mars. 386. — 17. And the chief qualification in both courts is, that they should be housekeepers or freeholders; but if they are housekeepers, the rent of their houses is immaterial, though it be under 10*l.*; nor is it necessary that they should have been assessed to the poor's rate. — 18. In respect of property, the principal ground of opposing bail is, that they are not worth double the amount of the sum sworn to, or one thousand pounds beyond that sum, if it exceed 1000*l.* after payment of all their debts. — 19. Upon this ground, bankrupts may be objected to, who have not obtained their certificates; or such as have been twice bankrupts, and not paid

Or, by consent, the defendant may justify them at a judge's chamber.
Mod. Ca. 24.

So

15s. in the pound. *Mountain v. Wilkins*, Tidd, 268. — 20. And bail have been rejected, who did not know the defendant. Tidd, 268. — 21. Or had been bail before, but did not know in how many actions, or for what sums. *Lofft.* 72. 194. — 22. But it seems that the circumstance of not knowing the defendant, being only a mark of suspicion, may be explained away. Tidd, 268. — 23. And a person was admitted to be bail, in respect of mortgage money secured on an estate in Ireland. *Ibid.* — 24. Where the bail had assumed feigned names, the court of common pleas ordered them and the attorney to be set on the pillory. 1 Str. 384. — 25. And "if any person shall acknowledge or procure to be acknowledged any recognizance or bail in the name of another person, not privy or consenting to the same; or, before a commissioner shall represent or personate another person, whereby he may be liable to the payment of any debt or damages, he shall on conviction, suffer death as a felon, without benefit of clergy." 21 Jac. 1. c. 26. 4 & 5 W. & M. c. 4. — 26. But the courts will not vacate the proceedings against the party personated, until the offender be convicted. T. Jon. 64. 1 Vent. 501. 3 Keb. 694. Ld. Rd. 445. — 27. Nor can a conviction take place until the bail-piece be filed. 2 Sid. 90. — 28. Bail may be asked whether they have not been in the pillory for perjury. 4 T. R. 440. — 29. And where a man who had offered himself as bail confessed, on being examined by the court, that he had sworn himself, he was presently adjudged to be committed to prison, and to stand upon the pillory with a paper mentioning the cause, viz. "for false bail," and to be brought into the court of K. B. C. P. and exchequer; and this upon his confession was recorded in court without other proceedings against him. Cro. Car. 146. — 30. But if bail have sworn to a false account of their property without the privity of the defendant or his attorney, the plaintiff has no other remedy than by indictment for perjury. 5 Taunt. 776. — 31. Where the bail do not attend, or are not permitted to justify on account of a defect in the notice of bail or justification, the courts, as a favour, will in general allow them further time to justify. *Lofft.* 72. 187. Tidd, 269. et vide 1 B. & P. 660. — 32. Unless it be on a habeas corpus or writ of error, in which case, on account of the delay, this indulgence is not granted. Tidd, 269. — 33. And where bail were put in in time, but did not come to justify pursuant to notice, and the defendant's attorney gave a new notice for the next day, the bail were permitted to justify on payment of the costs of the first attendance. *McCormick v. Foulger*, Tidd, 269. Imp. C. P. 185. — 34. But where bail are rejected on account of some personal insufficiency, the courts will seldom allow further time to add and justify others. Tidd, 270. — 35. In the king's bench, when a motion is made for further time to justify bail, it must be supported by an affidavit of the special facts alleged in excuse of the bail not attending at the time mentioned in the notice of justification; or in case further time be given, upon suggestion of counsel, then the bail shall not be permitted afterwards to justify, unless at the given time such an affidavit be produced as before described. *Ibid.* — 36. It is a rule in that court that where there have been three notices and two changes of bail, they shall not be allowed to justify, until the plaintiff has been paid his costs. Tidd, 270. — 37. And in the common pleas, bail were not permitted to justify till the costs of a former opposition were paid to the plaintiff, though the defendant was in custody. 1 Taunt. 57. — 38. If the bail do not justify at the time appointed, and no further time be given, they are said to be out of court. 1 Crompt. 66, 7 Mod. 50. — 39. Though bail who had been rejected, are still competent to render the defendant in the king's bench, so long as they remain on the bail-piece. Tidd, 270. — 40. Though it is otherwise in the common pleas. *Ibid.* — 41. When the bail are allowed, a rule or order of allowance should be drawn up, with the clerk of the rules in the king's bench, or secondaries in the common pleas, and a copy of it served on the plaintiff's attorney, even though he has opposed their justification. 4 T. R. 493. 2 B. & P. 341. 3 M. & S. 145. — 42. After which, the bail-piece in the king's bench should be obtained from the judge's chambers, and filed with the masters. Tidd, 270. — 43. This should regularly be done the same term in which they were allowed. R. H. 1650. reg. 3. K. B. — 44. And in filing the bail in that court, it should be observed, that every bail taken on or before the continuance day is a bail, and to be filed in the preceding term, and every bail taken after the continuance day is a bail, and to be filed of the subsequent term; but where new bail are added to other bail taken on or before the continuance day, the new bail shall be taken and filed as of that term in which the first bail was put in. R. E. 5 G. 2. reg. 1. (b) K. B. Vide 1 Salk. 100. — 45. If bail has been improperly allowed, the court will set aside the rule of allowance. Tidd,

So in vacation for necessity; but then he ought afterwards to justify them in court the next term. Mod. Ca. 24. (o)

So in error, the defendant ought to except, and give notice thereof in 20 days; and the exception shall be entered with the clerk of the errors. Mod. Ca. 230.

And he shall also serve a rule before execution. Mod. Ca. 230.

Tidd, 271. — 46. The bail-piece being filed in the king's bench, or bail perfected in the common pleas, an entry should be made of the recognizance on a roll called the recognizance-roll, which should be docketed and carried into the treasury chamber. Ibid. — 47. And this should regularly be done before any proceedings are had against the bail, or at least before they are called upon to plead. Ibid. — 48. For otherwise they may plead *nul tiel* record, and if the recognizance-roll be not carried in till afterwards, it seems that they may withdraw their plea, and the plaintiff must pay the costs of it. Ibid. — 49. In the K. B. the recognizance of bail by bill is entered by the plaintiff's attorney after the declaration, with a memorandum of the term it is of. Ibid. — 50. But by original it is entered by the filacer after a recital of the process. Ibid. — 51. And if in a joint action against two defendants, the recognizance of bail be entered by mistake in an action against one only, and the plaintiff after two writs of *scire facias* against the bail, and *nihil* returned to them, sign judgment against the bail, and take out execution, the court will set aside the judgment and execution for irregularity. 1 M. & S. 199. — 52. In the common pleas, the filacer enters the recognizance on the roll, and docketts it. Tidd, 271. — 53. And where the plaintiff was called by a wrong name in the recognizance-roll, that court would not rectify the mistake, but gave judgment for the defendants on an issue of *nul tiel* record. 3 Taunt. 263. — 54. So they would not amend a clerical error in the spelling of the plaintiff's name in the recognizance, without the consent of the bail; 5 Taunt. 814. — 55. But in *scire facias* against bail in that court, if there be a failure of record through a misprision of the officer, the court will permit the entry of the recognizance to be amended. 1 Taunt. 221. et vide Ca. Pr. C. P. 74, 75. Barnes, 59. Id. 415. Sed vide 1 B. & P. 481. — 56. And in a subsequent case, the entry was amended at the instance of the bail, where the plaintiff's name had been mistated. 4 Taunt. 875. Tidd, 266 — 272.

(n) Where the bail already put in do not mean to justify, others should be added, before a judge, on the bail-piece by bill, or in the filacer's book by original, in K. B., or in C. P., with the filacer or his clerk, within the time allowed for their justification; and if there be not time enough, defendant's attorney may take out a summons, and obtain an order for further time. 1 Crompt. 64, 5. 88. &c. Tidd, 254.

(o) 1. But a doubt having arisen whether a prisoner could be bailed in vacation, it was enacted by the statute 43 Geo. 3. c. 46. s. 6. that "if any defendant shall be taken, detained or charged in custody, at the suit of any person or persons, upon mesne process issuing out of any of his majesty's courts of record at Westminster or Dublin, and shall be imprisoned or detained thereon after the return of such process, it shall and may be lawful for such defendant, in vacation time only, and upon due notice thereof given to the attorney for the plaintiff or plaintiffs in such process to put in and justify bail; the letter of the statute includes the power of putting in bail before a commission, as given by the stat. 4 W. & M. ante 245; and see observations in Tidd, infra, before any one of the justices or barons of the court out of which such process shall have issued; who may, if he shall think fit, thereupon order a rule to issue for the allowance of such bail, and may further order such defendant to be discharged out of custody, by writ of *supersedeas* or otherwise, according to the practice of such court, in like manner as the same is and may be done by an order of court in term time." — 2. To discharge a defendant out of custody on this statute, bail above must be put in before a judge, and notice thereof given to the plaintiff's attorney in the usual way; after which another notice should be given, that the bail will justify themselves on a certain day at a judge's chambers, and an affidavit made of the service of such notice; and when the bail have justified, the judge will order a rule to be drawn up for their allowance, and for the discharge of the defendant if in custody of the marshal, or for a writ of *supersedeas* to issue if in custody of the sheriff or warden of the Fleet prison; and thereupon a rule being drawn up by the clerk of the rules in the K. B., or secondaries in the C. P., and a writ of *supersedeas* issued when necessary, and delivered to the sheriff or warden, the defendant will be discharged out of custody. Tidd, 273. Tidd, 272, 273.

(K 5.) Remedy for insufficient bail.

By the st. 23 H. 6. 10. if the sheriff returns a *cepi corpus*, or *reddidit se*, he shall have his prisoner at the return day, as before the act.

And if he has not, the sheriff shall be amerced by the court, upon a rule given to bring in the body. Compl. Att. 311. 1 Sal. 99.

The first amercement shall be 40s., and if he has not the body then, the plaintiff shall have an *habeas corpus*. Comp. Att. 311.

If he does not return the *habeas corpus*, he shall be amerced. Comp. Att. 311.

If he returns *languidus in personâ*, the plaintiff shall have a *duces tecum licet languidus*. Comp. Att. 311.

If he still makes default, the amercements shall be encreased, and repeated *toties quoties*, and shall be estreated into the crown-office, and so into the exchequer. Comp. Att. 311.

If there be an exception to the bail, and they be not justified, there shall be an amercement against the sheriff, notwithstanding the bail.

Though the bail to the sheriff be offered to the court. Per Holt, Mod. Ca. 122.(p)

But

(p) 1. If there be no bail-bond, or the plaintiff be dissatisfied with the bail taken by the sheriffs, it is usual to rule him to return the writ. Gilb. C. P. 21. R. M. 6. G. 2. (a). 2 Saund. 61. & n. — 2. And as in K. B. if the sheriff's bail become bail above, the plaintiff cannot except to them, after he has taken an assignment of the bail-bond (though it is otherwise in the C. P.) if the plaintiff in that court be dissatisfied with the bail taken by the sheriff, he can only proceed by ruling him to return the writ and bring in the body. Tidd, 295. — 3. But a rule to return the writ cannot be had, after the plaintiff has taken an assignment of the bail-bond, if valid; for by taking such assignment he discharges the sheriff. Gilb. C. P. 21. 1 Salk. 99. 3 B. & P. 564. — 4. Though if the bail-bond be void it is otherwise. 1 Wils. 223. Williams v. Jacques, Tidd, 296. — 5. So it has been holden, that if the sheriff appoint a special bailiff to arrest the defendant, at the request of the plaintiff or his agent, he cannot be ruled to return the writ. 2 Blk. 952. 4 T. R. 119. — 6. But he is notwithstanding responsible for the safe custody of the defendant after the arrest made. 8 T. R. 505; et vide. 2 Esp. 591. — 7. The rule to return the writ is a side bar or treasury rule, which expires in four days after service in London or Middlesex, and in six days in any other city or county. R. T. 6 G. 3. K. B. 3 Burr. 1921. R. M. 6 G. 2. K. B. — 8. In K. B. it is obtained from the clerk of the rules; and usually taken out on the return day of the writ by bill, or *quarto die post*, by original, in order that it may keep pace with the time to put in bail; but it cannot regularly be taken out before, though dated on the return day, or *quarto die post*, by original. 1 T. R. 552. 2 East, 242. Tidd, 296. — 9. In the C. P. the sheriff had formerly in all cases six days after service of the rule to return the writ. R. H. 8 G. 1. C. P. — 10. But the time for returning it in town causes was afterwards reduced to four days, so that now it is the same in both courts. R. H. 7 G. 3. C. P. Barnes, 494. — 11. The rule to return the writ is obtained from the secondaries in the C. P., and usually taken out on the first day of term, where the process is returnable on the first return; or if returnable on the second or any subsequent return, it may be taken out on the return day of the process, being the periods from which the time for putting in bail is reckoned. Tidd, 297. — 12. But by 20 G. 2. c. 37. s. 2. no sheriff shall be liable to be called upon to make a return of any writ or process, unless he be required so to do within six months after the expiration of his office. — 13. Upon which statute it has been holden, in case of sheriffs, that the months are lunar months; that the day of the sheriff's quitting his office is to be reckoned as one; and that the sheriff cannot be ruled to return the writ after the expiration of six months, though requested before. Dougl. 463. 2 Saund. 47. m. 2 T. R. 1. — 14. The rule to return the writ being intended to bring the sheriff into contempt, must be personally served upon the sheriff himself, or his under-sheriff. Ca. Pr. C. P. 125. Fr. Reg. 381. — 15. Except in London, Middlesex, and Surrey, where service on the deputy secondary of the compters, sheriff's deputy, or under sheriff's agent in town,

is deemed sufficient. Dougl. 420. 5 T. R. 351. — 16. In K. B. where the rule expires in vacation, the sheriff need not return it till the first day of the ensuing term, and has the whole of that day to file his return. 5 East, 386. 1 Smith, 427. — 17. But in the C. P. where a rule to return a writ expires in vacation, the sheriff must file it at the return, and cannot wait till the ensuing term, the C. P. office being open during the vacation. 1 Taunt. 647. 1 Mars. 270. — 18. The sheriff being ruled to return the writ, either does or does not return it. — 19. And where the writ is executed by the old sheriff while in office, he ought to make his return to the same, and hand such writ and return over to the new sheriff who comes into office before the return day; and such new sheriff will return the writ, with the old sheriff's return thereon. — 20. And if the old sheriff, after arresting a defendant, suffer him to escape, and go out of office before the return day, he is answerable for the escape. 4 East, 604. — 21. If there be no return it is a contempt, for which the courts, on a proper affidavit, will grant an attachment. R. M. 6 G. 2. K. B. — 21. And this is the constant mode of proceeding against the late sheriff as well as the present one. Dougl. 464. — 22. But where the sheriff, on being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody; held that the plaintiff should have proceeded as if the sheriff had returned *cepi corpus*, and the court of C. P. set aside an attachment issued against the sheriff for not returning the writ. 1 Marsh. 289. — 23. The writ should regularly be returned by the sheriff on the day on which the rule for returning it expires; and in default thereof, the plaintiff may move for an attachment on the next day. R. M. 32 G. 5. K. B. 4 T. R. 496. — 24. Or in the K. B., if the rule expires on the last day of term, he may move for an attachment at the rising of the court on that day. 11 East, 591. — 25. And the rule for the attachment is regular, though the sheriff make his return on a subsequent day in vacation, before he is actually served with the rule. Ibid. — 26. In order to ascertain the time of making the return in the K. B. the *custos brevium* is required to indorse on every writ, on what day, and at what hour the same was filed. R. T. 30 G. 5. K. B. 3 T. R. 787. — 27. The sheriff's return to a *capias ad respondendum* is either that the defendant is not found in his bailiwick, or that he has taken him; and in the latter case it is either that he has him ready, or in custody, to answer the plaintiff, or by way of excuse, that he is sick or dead, or that he has escaped, or been rescued, or that the sheriff has discharged him or delivered him over to another custody by direction of the plaintiff, or by order of the court, or that he has been discharged from the arrest under st. 43 G. 3. c. 46. s. 2, on depositing in the sheriff's hands the sum indorsed on the writ, with ten pounds in addition, to answer costs, &c. Tidd, 299. — 28. If the sheriff return *non est inventus*, where he has or might have taken the defendant, he is liable to an action for a false return. 2 Esp. 475. — 29. And if he return *cepi corpus et paratum habeo*, where he has taken the defendant and let him go at large without bail, he is liable to an action, if the defendant be not in custody, or bail above be not put in and perfected at the return of the writ. Gilb. C. P. 22. Noy, 59. 1 Mod. 228. 2 Mod. 178. — 30. But where the sheriff has taken bail, he is not liable to an action upon the return of *cepi corpus et paratum habeo*. Cro. Eliz. 624. 808. 852. Noy, 39. 1 Sid. 22. 459. 1 Vent. 55. 85. 2 Saund. 60. 154. 1 Mod. 33. 57. 227. 2 Mod. 83. 177. 3 Salk. 314, 315. — 31. If the defendant reside within a liberty, the bailiff of which has the execution and return of writs, it is usual for the sheriff to return, that he has made his mandate to the bailiff of the liberty, who has given him no answer, or has returned that the defendant is not found in his bailiwick, or that he has taken the defendant and has him ready. Off. Bre. 168, 9. — 32. In the first case the plaintiff is entitled to a *non omittas* by the st. Westm. 2. c. 39. Gilb. C. P. 26. 1 Barnard K. B. 282. 9 East, 330. — 33. In the second, if the return be false, the bailiff is liable to an action; the sheriff not being answerable at common law, for the false return of the bailiff. Gilb. C. P. 30. — 34. In the last case, the ancient mode of proceeding was by *distringas*. Gilb. C. P. 31. Brownl. Brev. Jud. 35. — 35. But it seems the plaintiff may now be called upon by rule to bring in the body. 2 T. R. 5. — 36. If the bailiff make an insufficient return, he is liable to be amerced for it, and not the sheriff, by st. 27 H. 8. c. 24. Gilb. C. P. 30. — 37. Upon the sheriff's return of *cepi corpus et paratum habeo*, if bail above be not duly put in, or if put in and excepted to, they do not justify in due time, the plaintiff has his election, either to take an assignment of the bail-bond, or to proceed against the sheriff by ruling him to bring in the body. Gilb. C. P. 30. — 38. And if there be no bail-bond, or the plaintiff be dissatisfied with the bail taken by the sheriff, it is usual and necessary in the king's bench for the plaintiff to rule him to bring in the body. 2 Saund. 61. c. — 39. This is a four or six day rule, and should be served in like manner as the rule to return the writ. R. M. 6 G. 2. R. T. 6 G. 3. 3 Burr. 1921. R. H. 7 G. 3. C. P. — 40. In the K. B. it is obtained from the clerk of the rules; but in the C. P. it is given by the filacer who

issued the process on a note or extract of the writ and return from the *custos brevium*, after which the rule is drawn up by the secondaries and served. R. T. 2 W. & M. reg. 1. C. P. Imp. C. P. 205. 210. 211. — 41. And there should be no delay in giving the rule. 7 T. R. 452. et vide 3 B. & P. 151. 9 East, 467. — 42. The intent of this rule where the defendant is not in custody, is to compel the sheriff to put in and perfect bail above. R. M. 6 G. 2. (a) K. B. 1 Wils. 262. 1 H. Bl. 233, 234. — 43. And it cannot in general be taken out until the time for putting in bail has expired. 5 T. R. 479. 8 East, 525. Spicer v. Linnell, Tidd, 301. Imp. C. P. 212. 2 H. Bl. 276. 1 Price, 5. 103. — 44. In K. B. where the rule to return the writ is given on the return day, a rule to bring in the body, dated on the day of the return by the sheriff of *cepi corpus*, though issuing afterwards in the vacation, is irregular. 2 East, 241. — 45. But where the writ in a country cause was returnable on the first of June, and the sheriff was ruled to return it on the second, and on the eighth he returned *cepi corpus*, upon which the plaintiff on the same day served him with a rule to bring in the body, and on the fifteenth obtained an attachment, the court held the proceedings regular; although it was objected that the sheriff had all the eighth to return the writ, and consequently that the rule to bring in the body should not have been served till the ninth; for in this case, the time for putting in bail had expired, before the service of the rule to bring in the body. Parker v. Wall, Tidd, 301. Goodwin v. Montague, Ibid. — 46. Agreeably to which it is now settled, that in all cases where the time for putting in bail has expired, the sheriff may be ruled to bring in the body on the same day that he returns *cepi corpus*. Rex v. Sheriff of Middlesex, Tidd, 302. — 47. In the C. P. where a rule to bring in the body expires on the last day of term, the plaintiff is at liberty, at the rising of the court on that day, to move for an attachment for not bringing into court the body of the defendant; and such attachment may be accordingly issued on the following day, provided bail shall not then be perfected, or the defendant rendered in their discharge. R. T. 38 G. 3. C. P. — 48. When the sheriff is called upon to bring in the body, he must either bring it into court. Barnes, 392. — 49. Or put in, and perfect bail above, within the time allowed him by the rule. 1 Wils. 262. R. M. 6 Geo. 2. (a) K. B. 2 Saund. 61. c. — 50. Otherwise it is a contempt for which the courts will grant an attachment, on an affidavit of the service of the rule, and that no bail has been put in, or that bail has been put in, but not perfected. Tidd, 302. — 51. And where two sheriffs had been ruled to bring in the body, and then one of them died, the court granted an attachment against the surviving sheriff only. Willie v. Benwell. Tidd, 302. — 52. But the contempt is not incurred, till the day is past on which the rule to bring in the body expires; for the sheriff has the whole of that day to bring it in, and therefore an attachment cannot be moved for till the next day. Rex v. Sheriff of Essex, cited in 7 T. R. 528. 8 T. R. 464. — 53. And after the defendant has surrendered, an attachment against the sheriff, for not bringing in the body is irregular, though the surrender be not made until after the rule for bringing in the body has expired. Tidd, 302. — 54. In K. B. the plaintiff may move for an attachment against the sheriff at any time after the expiration of the rule to bring in the body; and if the attachment be obtained before the service of the rule for the allowance of bail, the sheriff is fined. Tidd, 303. — 55. But in the C. P. and exchequer, though the rule to bring in the body has expired, yet if the defendant justify bail before the attachment against the sheriff is moved for, it is in time to prevent the attachment. 1 H. Bl. 9. 1 Price, 103. ; et vide 1 B. & P. 325. 9 East, 468. — 56. And that court will never allow any advantage to be taken of the priority of motion on the same day. Ibid. 2 B. & P. 38. ; et vide 1 B. & P. 334. — 57. Therefore if bail be brought up on the same day on which an attachment has been obtained against the sheriff, the court will permit them to justify, and set aside the attachment. Ibid. — 58. But the plaintiff in such case is entitled to the costs of preparing to move for the attachment. Ibid. 3 B. & P. 603. — 59. So if the plaintiff to has incurred the costs of instructing counsel to move for an attachment, before the defendant gives notice of his surrender, though he surrender before the attachment is actually obtained, C. P. will order the costs of those instructions to be paid by the defendant, upon setting aside the attachment. 1 Taunt. 56. — 60. In counties palatine, the attachment or other process of contempt, issues against the party who is in fault. — 61. As against the chancellor of Lancaster. — 62. The bishop of Durham. 1 Sid. 92. — 63. Or the chamberlain of Chester. — 64. Or their officers. Andr. 191. and see Dougl. 749. 3 East, 131. — 65. If they refuse to make a mandate to the sheriff, or to return the writ into court, after he has made his return to them. — 66. Or against the sheriff, if he will not return his mandate, or bring in the body of the defendant, pursuant to his return of *cepi corpus*. Tidd, 303. — 67. It was formerly usual in the K. B. to proceed against the late sheriff, for not bringing in the body by *distingas*. Traxe, 144. 145. ; 2 Lil. Pr. Reg. 510. 5 Burr. 2726. Dougl. 464. — 68. But now, by rule of that court, where any sheriff, before his going out of office,

ſce, ſhall arreſt any defendant, and a *cepi corpus* ſhall afterwards be returned, he ſhall and may, within the time allowed by law, be called upon to bring in the body by a rule for that purpoſe, notwithstanding he may be out of office before ſuch rule ſhall be granted. R. T. 31 G. 3. K. B. 4 T. R. 379. — 69. A ſimilar practice has alſo obtained in the C. P. Barnes, 102. — 70. And in that court a ſheriff, who is ruled on the laſt day of term, but goes out of office before the next term, is liable to an attachment for not bringing in the body. 1 H. Bl. 629. — 71. The *distringas* againſt the late ſheriff was a judicial writ, iſſuing out of the king's bench office by bill, or filacer's office by original, and directed to his ſucceſſor, commanding him to diſtrain the late ſheriff by his lands, &c., ſo that he might have the defendant's body in court to answer the plaintiff. Brownl. Brev. Jud. Theſ. Brev. and Offic. Brev. tit. *Distringas*. — 72. This writ muſt have been made returnable on a day certain or general return, according to the former proceedings. Trye, 144, 145. — 73. And muſt have lain four days excluſive in the ſheriff's office; but it need not have been left there before the return, it being deemed ſufficient to leave it on the return day. Tidd, 304. — 74. Upon the firſt *distringas*, the ſheriff to whom it was directed, levied iſſues to the amount of 40s., which the plaintiff moved to increaſe; and if the debt were ſmall, the court would order the whole of it to be levied, with coſts, upon an *alias distringas*; but otherwiſe the plaintiff moved again to increaſe the iſſues, and ſued out a *pluries distringas*, &c., and when iſſues were returned to the amount of the debt and coſts, the plaintiff moved for a ſale of them, under the ſtatute 10 G. 3. c. 50. 5 Burr. 2726, 7. — 75. The attachment is a criminal proceſs, directed to the coroner, when it iſſues againſt the preſent ſheriff; or when againſt the late one, to his ſucceſſor. Tidd, 305. — 76. And in K. B. it muſt be made returnable at a general return, though the original proceſs was at a day certain. 1 Str. 624. — 77. The attachment may be moved for on the laſt day of term. 1 Burr. 651. — 78. And until it be granted, the proceedings in the K. B. are on the plea ſide of the court, and muſt be entitled with the names of the parties. Tidd, 305. — 79. But as ſoon as the attachment is granted, the proceedings are on the crown ſide, and from that time the king is to be named as the proſecutor. 3 T. R. 155. 253. 7 T. R. 439. 528. 2 Eaſt, 82. 12 Eaſt, 165. Et vide 2 B. & P. 517. — 80. If the coroner or ſheriff, being called upon by rule, neglect to return the attachment, he may be attached himſelf; and the attachment againſt the coroner ſhould be directed to elitors, named by the maſter in K. B. or prothonotaries in C. P. 2 Blk. 911, 1218. — 81. When the ſheriff is fined for contempt, he is liable in like manner as his bail upon the bail-bond, to the payment of what is really due to the plaintiff, though beyond the ſum ſworn to, and coſts, to the full extent of the penalty of the bond. 7 T. R. 570. 8 T. R. 28. 1 H. Bl. 233. 543. — 82. And he cannot relieve himſelf by payment of the debt ſworn to, and indorſed on the writ, ſince the ſt. 43 G. 3. c. 46. ſ. 2. having neglected to take the money at the time of the arreſt, as directed by that act; but muſt pay the whole debt and coſts. 9 Eaſt, 316. — 83. Neither can he be relieved on the ground of the defendant's death, after the contempt was incurred, and before the attachment iſſued. 3 T. R. 133. — 84. But he is not liable beyond the penalty of the bond. 3 Eaſt, 604. — 85. And if a party has a right to enforce payment of his debt againſt the ſheriff, he muſt purſue it within a reaſonable time, and not lay by ſo long, as that by his laches the ſheriff ſhall be deprived of his remedy over againſt the debtor. 9 Eaſt, 467. 3 B. & P. 151. 1 Taunt. 111. — 86. So a *cognovit* for payment of the debt and coſts by instalments, diſcharges the ſheriff, notwithstanding a co-temporaneous agreement that the right of moving for an attachment againſt him ſhould remain with the plaintiff as a ſecurity, in caſe any of the instalments ſhould not be paid. 1 Taunt. 159. and ſee 4 Taunt. 456. 5 Taunt. 319. 1 Mars, 59. Wightw. 121. — 87. But where the plaintiff, at the deſire of the ſheriff's officer, forbore to enforce an attachment in the firſt inſtance, and two days afterwards applied to the ſheriff for the debt and coſts, C. B. held that the ſheriff was not diſcharged by the indulgence given to the officer. 1 Taunt. 489. — 88. If the proceedings againſt the ſheriff are irregular, they may be ſet aſide. Tidd, 306. — 89. If regular, may be ſtayed by the favour and indulgence of the court, in order to let in a trial of the merits for the benefit of the ſheriff, or of the defendant, or his bail. 2 H. Bl. 235. Goodwin v. Montague, Tidd, 306. — 90. The practice in theſe caſes is to move for a rule to ſhew cauſe, why on putting in bail, the proceedings againſt the ſheriff ſhould not be ſtayed; and to have the bail ready to juſtify, when the rule is diſpoſed of. 1 B. & P. 334. — 91. If the plaintiff has not loſt a trial, the court will ſet aſide the proceedings, upon putting in and perfecting bail above, and payment of coſts. 4 T. R. 352. 2 H. B. 235. — 92. In ſuch caſe, however, if the application be made on behalf of the defendant, they will require an affidavit of merits; or if made by the ſheriff or bail, who cannot be expected to ſwear to merits, an affidavit is required, that the application is made on their behalf, without collusion with,

But the most usual way is, that the sheriff assigns the bail bond to the plaintiff. (p)

And

with, or indemnity from the defendant. 7 T. R. 239. 3 M. & S. 299. Et vide 1 N. R. 123.—93. If a trial has been lost, the court will farther require that the attachment shall remain in the office, and stand as a security to the plaintiff for the sum recovered. Gravett v. Williams, cited 4 T. R. 352. — 94. But upon setting aside a regular attachment, on payment of costs, the question whether or not the attachment shall stand as a security, depending upon the fact whether a trial has been lost, it is for the plaintiff, who seeks to qualify the rule, to shew by his affidavit the necessary facts, such as the day of the delivery of the declaration, &c. which may entitle him so to do. 5 Taunt. 606. — 95. When the sheriff has been guilty of a breach of duty, in discharging the defendant out of custody, without the plaintiff's assent, upon his own undertaking to appear and put in bail, instead of taking a bail-bond, the court will not assist him by staying the proceedings in an action for an escape, or by setting aside the attachment. 7 T. R. 109. 239. Et vide 1 B. & P. 225. 1 Taunt. 119. — 96. And it is now decided, that he cannot, after paying the debt and costs, maintain an action against the defendant, for money paid. 8 East, 171. — 97. But if he has taken a bail-bond, he may resort to the defendant or his bail, by putting it in suit against them; though in general the money is paid by the officer, on issuing the attachment, and he brings the action on the bail-bond in the sheriff's name. 2 Saund. 61. f. — 98. Where bail above were put in, but not justified, and the sheriff being fined, brought an action on the bail-bond, to which the defendant pleaded *comperuit ad diem*, C. B. on motion by the sheriff, ordered the recognizance of bail in the original action to be struck off the file; though the defendant alleged that the sheriff was fined through his own negligence; for that should have been the subject of a motion to stay proceedings on the bail-bond. 1 Mars. 520. Tidd, 295—308.

(p) 1. If the bail below be sufficient, it is usual for the plaintiff to take an assignment of the bail-bond. — 2. Which it seems he may do, even after service of the rule to bring in the body. Robinson v. Owen. Tidd, 287. Poidevin v. Harvey, Ibid. 5 B. & P. 564. Wightw. 406. But Imp. K. B. 203. 214, contra. — 3. Or moving for an attachment, Tidd, 287. — 4. But after he has sued out an attachment against the sheriff, he has made his election, and cannot afterwards, whilst the attachment remains in force, take an assignment of the bail-bond. Cunningham v. Chambers. Tidd, 287. — 5. And in the C. B. if bail above be put in and justified in due time after the sheriff is ruled to bring in the body, the court will set aside proceedings in an action upon the bail-bond, commenced previous to the time of justification. 3 B. & P. 564. — 6. So that the plaintiff in that court is not at liberty to proceed upon the bail-bond, pending the rule to bring in the body. — 7. But where the sheriff's officer, on the attachment being lodged, prevailed on the plaintiffs to withdraw it, and take an assignment of the bail-bond, which the plaintiffs, in order to relieve the sheriff, accordingly took and commenced an action thereon; K. B. held that the plaintiffs might abandon their attachment in this case, and then take an assignment and proceed on the bail-bond. 15 East, 215. — 8. And in the exchequer, where the attachment against the sheriff has been set aside for irregularity, it is no bar to an assignment of the bail-bond. Wightw. 406. — 9. Before the statute of Ann (recited in the text) the sheriff was not compellable to assign the bail-bond. 1 Mod. 228. — 10. Though if he had not assigned it, the court would have amerced him. 1 Sid. 23. 2 Mod. 84. — 11. And the old way was, first to give a rule for the sheriff to bring in the body, before the plaintiff could take an assignment of the bail-bond. 1 Salk. 99. — 12. Another mischief at common law was, that after an assignment of the bail-bond, the action thereon must have been brought in the name of the sheriff, who might have released it, and thereby driven the plaintiff into a court of equity. Gilb. C. P. 2. — 13. To remedy which inconveniences the st. 4 & 5 Ann, c. 16. passed. — 14. Upon which statute it has been said, that the bail-bond may be assigned before it is forfeited, though it cannot be put in suit till afterwards. Barnes, 77. — 15. And it is a rule in the C. P. that no bail-bond taken in London or Middlesex, by virtue of any process issuing out of that court, returnable on the first return of any term, shall be put in suit until after the fifth day in full term; and that no bail-bond taken in any other city or county, by virtue of such process, shall be put in suit until after the ninth day in full term; and that no bail-bond taken in London or Middlesex, by virtue of any process issuing out of that court, returnable on the second or any other subsequent return, shall be put in suit until after the end of four days, exclusive of the day on which such process shall

shall be expressed to be returnable; and that no bail-bond taken in any other city or county, by virtue of such last-mentioned process, shall be put in suit until after the end of eight days, exclusive of the day on which such last-mentioned process shall be expressed to be returnable; upon pain of having all proceedings upon such bail-bonds to the contrary, set aside with costs. R. T. 30 G. 3. C. P. 1 H. Bl. 525, 6. Et vide H. 9. Ann. reg. 4. C. P. 2 Blk. 1009. — 16. But in K. B. it has been holden, that if the fourth day for perfecting bail be the last day of term, and the bail be not perfected before the rising of the court on that day, an assignment of the bail-bond to the plaintiff in the evening of that day, is regular. 8 T. R. 4. — 17. After default made in putting in special bail in time, it is not enough that bail are afterwards put in; but plaintiff may take an assignment of the bail-bond, and proceed thereon, unless the bail be also justified, though not before excepted to. 7 East, 607. — 18. And where the defendant had neglected to put in and perfect bail above, K. B. held that the plaintiff was not out of court by omitting to declare in the original action within two terms after the return of the writ; but he might still take an assignment of the bail-bond. 2 Str. 1262. Carmichael v. Chandler, Tidd, 290. Imp. K. B. 208. Pr. Reg. 71. — 19. But where the plaintiff is completely out of court, by not declaring in the original action, (in K. B. within a year after the return of the writ, in C. P. before the end of the vacation of the second term after it is returnable) it seems that he cannot afterwards regularly take an assignment of the bail-bond. 2 Blk. 876. 4 Taunt. 715. — 20. And in C. P., though the assignment of the bail-bond be regular, as being taken while the action was pending, yet if the plaintiff be afterwards guilty of laches, to the prejudice of the bail, the court will stay the proceedings thereon. 3 B. & P. 221. 4 Taunt. 715. — 21. The plaintiff, however, may proceed against the bail, although the action be out of court, if it do not appear that it was out of court, before the plaintiff took an assignment of the bail-bond. 4 Taunt. 715. — 22. The assignment may be made by the high sheriff, or by the under-sheriff, in his name, and even by the under-sheriff's clerk in his office. Harris v. Ashley, Tidd, 290. French v. Arnold, Ibid. 1 Str. 60. 4 Camp. 36. Sed vide 1 Str. 60. 10 Mod. 288, contra. — 23. And must be stamped with a half-crown stamp before the action commenced. — 24. And as the assignment may be made, so the action may be brought in any county. 2 Str. 727. 2 Ld. Rd. 1455. — 25. But it must necessarily be brought in the same court whence the process issued on which the bail-bond was taken, otherwise the parties could not have the relief intended by the statute. 1 Burr. 642. 3 Burr. 1923. Barnes, 92. 117. 3 Wils. 348. 2 Blk. 838. — 26. This rule applies in K. B. to actions brought on the bail-bond by the sheriff himself, as well as his assignee. 8 T. R. 152. — 27. But it is otherwise in C. P. 1 H. B. 651. — 28. And although it be irregular to bring an action on the bail-bond, in a different court from that in which the original action was commenced, yet defendant cannot take advantage of this under the plea of *non est factum*. 2 Camp. 396. — 29. When the plaintiff has taken an assignment of the bail-bond, he cannot proceed in the original action, so long as he retains his right to sue upon it. Eaton v. Beattie, Tidd, 291. 2 Smith, 489. 4 Taunt. 715. — 30. The proceedings on the bail-bond may be set aside if irregular; or stayed if regular, upon terms, at the instance of the defendant or his bail, in order that there may be a trial in the original action. Barnes, 74. — 31. In general the irregularity is in the writ, as that it was returnable in a day out of term. 1 Str. 399. — 32. Or in the affidavit to hold to bail, arrest, bail-bond, or exception to bail, or that the bond was put in suit before it was forfeited. Tidd, 291. — 33. And the assignment of the bail-bond was set aside, as having been made pending a rule to set aside proceedings for irregularity, and to stay proceedings in the mean time; the proceedings being suspended thereby for all purposes, till the rule was discharged. 4 T. R. 176. — 34. But the courts will not order the bail-bond to be delivered up to be cancelled, on the ground of a misnomer. 3 T. R. 572. 2 B. & P. 109. — 35. Nor can it be cancelled, in C. P., because a defendant has been arrested on a special *capias* in which, as well as in the affidavit to hold to bail, the initials only of his christian name were inserted. 2 B. & P. 466. — 36. Or because the place where the affidavit to hold to bail was sworn, is not mentioned in the jurat. 1 B. & P. 105. — 37. So if a non-commissioned officer has been arrested, and given bail, C. P. will not, after judgment recovered against the bail, set aside the proceedings, and cancel the bail bond. 4 Taunt. 557. — 38. And in that court, if a plaintiff sue out writs into two counties, and arrest the defendant, who gives bail to the sheriff in both, the plaintiff may regularly proceed upon the first bail bond. 2 Taunt. 67. — 39. In order to stay proceedings on the bail-bond, bail alone must first be put in and perfected in the original action. Wils. 6. — 40. And wherever the defendant is guilty of a neglect, in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice, in
case

sheriff, by colour of his office, shall be void, yet a bond by sureties, who are not sufficient, is not void by this statute; for it only avoids bonds taken in other form than the statute prescribes, not different in matter. Semb. cont. Cro. El. 672. R. acc. Cro. El. 808. 852. 862. Mo. 636. (s)

Yet a bond to appear in a plea, or at a place, different from the return of the writ, is void. R. 1 Vent. 233, 4. Vide Pleader, (2 W. 25.) (t)

So, if the judges in an inferior court take insufficient bail, an action upon the case does not lie against them; for they do it as judges, and not as gaoler, though they also have the custody of the gaol. R. Hutt. 120.

But if the bail in the inferior court, upon an *habeas corpus* to remove the cause, procure others whom they know to be insufficient, to be bail in the superior court, an action upon the case lies against them. R. Cro. El. 714. Vide in Action upon the Case for Deceit, (A 4.)

(K 6.) Remedy for refusing bail.—Vide ante, (F 5.)

But if a man refuse bail, when he ought to take it, an action upon the case lies against him. R. Cro. Car. 196. R. 2 Mod. 31. R. 1 Leo. 189. (u)

So an action upon the st. 23 H. 6. 10. for 40*l.* by any one *qui tam*, &c. Cro. El. 76.

Or, an action upon the same statute for treble damages, by the party grieved.

But a refusal of bail does not subject him to a false imprisonment. R. Cro. Car. 196. R. 2 Mod. 31.

And there shall not be an action upon the case against the bailiff who refuses, but against the sheriff. 2 Mod. 32.

(L) At what time bail shall be allowed.

Vide ante, (H).

Bail may be given generally, upon an appearance by the defendant. But where the defendant comes in custody, generally, he shall not be admitted to bail, till the return of the writ.

As, if he be taken upon a *capias in withernam* in an *homine replegiando*, he shall not be bailed till the writ be returnable, and a declaration demanded, and *non cepit* pleaded. R. Sal. 583.

So in an appeal, the defendant ought not to be bailed till the return of the writ. Sal. 582.

(s) Vide supra.

(t) Vide supra.

(u) 1. Gilb. C. P. 20. W. Jones, 226. 1 Sid. 22. 2 Mod. 84. 180. 2 Vent. 96. 6 T. R. 255. — 2. But to support the action it must appear, that the persons tendered as bail had sufficient within the county where the arrest was made. 15 East, 320. — 3. And that they dwell therein. Cro. Eliz. 808. 852. 862. Noy, 39. 1 Sid. 90. 2 Saund. 59. 1 Mod. 227. 239. 2 Mod. 83. 177. Sed. vide Ld. Rd. 425. 1 Salk. 99. 6 Mod. 122.

(M) How far the bail shall be liable.

If common or special bail be given in B. R. by the course of the court, it shall be common (x) bail to any other action against the same defendant in the same term. 4 Inst. 179. 2 Cro. 449. 1 Mod. 16. *2 Sho. 183. 335.

So, if bail be filed the last day of the term in B. R. and the bill be any day of the same term, the bail shall be liable upon it. 1 Rol. 333. l. 20.

So the bail shall be liable, though the plaintiff does not declare within two terms, where he was stayed by injunction, if he declares after the injunction dissolved. R. 3 Mod. 274.

So bail in B. R. being general, and not for a sum certain, shall be liable for the whole condemnation, though the bail to the sheriff was for a less sum. Per Pemb. Ch. Jus. and Secondary. Skin 70. (y)

If judgment in the original action be for the defendant, and afterwards reversed in error, the bail in the original action will be liable, as well as if the first judgment was for the plaintiff. R. 2 Cro. 95. Dub. 2 Jon. 96.

And the bail is not discharged by removal of the record by writ of error. R. Mo. 850.

If there be bail in an inferior court, and afterwards the cause is removed by a *habeas corpus*, and bail filed in B. and then remanded by *procedendo* the same term; the bail in the inferior court will be liable, as if it never was removed. D. cont. generally. 1 Sid. 313. R. cont. 2 Cro. 203. Yel. 120. Bro. Mainprize 6. But it was R. acc. 2 Cro. 363. and said there, that Bro. shall be intended, where the *procedendo* was not the same term. R. Mo. 836. 2 Bul. 286. Acc. 1 Rol. 64.

(x) 1. But Mr. Tidd states, that in K. B. the ancient course of the court was, that if a man became bail for another upon a latitat, &c. in any sum of money, however trifling, he was (special) bail for him in all actions brought by the same plaintiff; during the same term, were the sums ever so great. Cro. Jac. 449. 2 Sid. 163. 1 Mod. 16. — 2. And that to rectify this extraordinary practice, a rule was made, that if the plaintiffs should declare against the defendant, upon any bail by him put in, for a greater sum than was expressed in the process upon which the defendant was arrested, then the bail so put in should not be chargeable in that action. R. T. 22 Car. 2. K. B. 6 Mod. 267. Tidd, 265.

(y) 1. 5 Keb. 16. — 2. So formerly the rule was, that where plaintiff declared for and recovered a greater sum, the bail were totally discharged. 6 Mod. 266. 1 Salk. 102. infra (N). — 3. But now it is settled, that where the plaintiff declares for or recovers a greater sum than is expressed in the process upon which he declares, the bail shall not be discharged; but be liable for so much as is sworn to, and indorsed upon the process, or for any less sum, which the plaintiff in such action shall recover, together with the costs of the original action. 2 Str. 922. R. E. 5 G. 2. reg. 2. K. B. Lofft, 545. Dougl. 330. 8 T. R. 28, 9. 1 East, 90. Peterken v. Sampson, Tidd, 266. n. 6 T. R. 313. — 4. And there is no distinction in practice, between actions commenced by bill and by original writ; but the court will, in either case, enter an *exoneretur* upon the bail-piece, upon payment of the sum sworn to, and costs, though less than the sum acknowledged to be due. 6 East, 312. 2 Smith, 402. Tidd, 266. — 5. They are liable, however, jointly or severally. Dougl. 330. 1 East, 86. Id. 91. n. 2 Smith, 402. 6 East, 312. — 6. In C. P. too, each of the bail is separately liable for the sum recovered, to the full extent of the penalty of the recognizance, being double the amount of the sum sworn to, or indorsed on the writ under a judge's order. Barnes, 76. 1 B. & P. 205. Tidd, 266. — 7. They are not liable for causes of action not specified in the affidavit to hold to bail. 7 Taunt. 304. 1 B. Moore.

(N) To what they shall not be liable.

But if a cause be removed by *habeas corpus*, and afterwards remanded by *procedendo* in another term, the bail below will be discharged. R. 2 Cro. 363. 2 Bul. 286.

Or if it be remanded after the bail below discharged. Yel. 120.

So bail in an original action shall not be charged with costs in a writ of error, if the judgment be affirmed. R. 1 Rol. 335. 1. 40. R. 2 Cro. 636. R. Cro. El. 587, 8. (z)

Nor the bail upon error in B. R. of a judgment in C. B. for the costs in error in parliament upon a judgment affirmed in B. R. 1 Sal. 97. For the party shall give new bail upon error in parliament. 2 Mod. Ca. 79.

So, if bail be given in a suit by A. against B. they shall not be charged, if A. declares against B. and another jointly. R. 2 Jon. 188.

So, if three men bring an action, and the defendant puts in bail at the suit of four, they cannot declare. D. 1 Mod. 5.

So, if the party for whom bail is entered be misnamed, the bail shall not be charged. Semb. Cro. El. 223, (458, 9.) Mo. 407.

Or the declaration and judgment be for a larger sum than was contained in the *ac etiam*. Mod. Ca. 266. 1 Sal. 102.

So, if there be bail in an action *in comitatu Eborum*, upon which the plaintiff declares *in comitatu civitatis Eborum*; though the judgment be right, and the action for the same sum, and against the same person for whom bail was given, the bail shall not be liable. R. 3 Lev. 235.

So in an action against A. and B., if bail be given by A. in Michaelmas term, and by B. in another term, they are not chargeable. Somb. Lat. 183.

Misprision in the bail-piece, or *reddidit se*, shall not be amended to be conformable to the writ. Mod. Ca. 309.

But the declaration may be amended, to make it agreeable to the bail. Mo. 407.

(O) What will be a breach of the recognizance.

If after a bail-bond for appearance, the principal surrenders (a) him-

(z) 1. 6 T. R. 288. — 2. Nor is the plaintiff entitled to levy equitable costs, out of the penalty of the recognizance. 2 Str. 826. 1 Barnard, K. B. 125. — 3. Nor are they liable for interest on the judgment in the original action. 3 Taunt. 503.

(a) 1. The defendant, formerly, could not have discharged his bail to the sheriff by surrendering himself before the return of the writ. 5 Burr. 2683. Dalt. Sher. 356. — 2. But now if defendant surrender himself to sheriff before or on the return day of the writ, the bail-bond may be cancelled; after which the plaintiff can neither proceed against the sheriff by rule, nor can he sue him for not assigning the bond, nor can he take an assignment of it. 6 T. R. 753. 7 T. R. 122. 1 B. & P. 325. Callaway v. Seymour, Tidd, 230. n. — 3. Yet it is optional with the sheriff, whether or not he will accept the surrender. — 4. Therefore defendant is not in his custody merely by surrendering to his gaoler, and giving him notice thereof. 1 East, 383. — 5. Nor semble is rendering defendant to K. B. prison, before the return of the writ, of any avail. Forster v. Hyde, K. B. Tidd, 231. n.; sed vide 3 B. & P. 282. — 6. Where however the return day was the first of the term, upon which day, before twelve o'clock, defendant surrendered to the county gaoler, and the under-sheriff, who lived seventeen miles off, accepted the surrender by letter next day; it was held sufficient. 10 East, 100. — 7. Surrender by bail below after bail above put in, but not perfected, though before assignment of the bail-bond, is no discharge. 1 Price, 262,

self

self to custody before the day for appearance, but afterwards does not appear, the bail shall not be excused. Semb. 3 Mod. 88.

If there be bail in C. B. and afterwards removed to B. R. and debt there upon the recognizance, it is sufficient to say, that the principal did not surrender himself to the Fleet, without saying, nor to the marshal of B. R. 2 Cro. 98. (b)

If the plaintiff in error does not take out a *scire facias ad audiendum errores*, the bail forfeit their recognizance; for they are bound, that the plaintiff do prosecute the error with effect. R. 1 Rol. 337. l. 5.

Or if he takes out a *scire facias*, but does not deliver it to the sheriff. R. 1 Rol. 337. l. 7.

Or does not assign errors. R. 1 Sid. 294.

If a man, bailed upon an indictment, surrender himself to the Fleet in discharge of bail in an action, and is afterwards removed by *habeas corpus* to B. R., and there escapes; the bail shall not be excused, unless he was surrendered in discharge of his bail upon the indictment. 1 Sal. 105.

(P) What not.

But if the party appears at a subsequent day in the same term, the bail-bond is not forfeited. R. 1 Brownl. 74.

Though the issue be upon *comperuit ad diem*. 1 Brownl. 74.

So, if the condition be for an appearance at Westminster, and the term being adjourned to St. Alban's before the day, he appears there. R. Mo. 430.

So, if he puts in common bail, he shall plead *comperuit ad diem*. 1 Sal. 8.

(Q) How the bail shall be relieved. (c)

(Q 1.) By act of the court. (d)

If bail be given, where the party has the privilege (e) of an insolvent debtor by the statute (f), the bail shall be thereby discharged upon motion. Mod. Ca. 22.

So

(b) A recognizance given in an action against two, "in case the said C. and D should happen to be condemned," is forfeited by the condemnation of either; for that meets the spirit, though not the letter of the recognizance. 4 M. & S. 53.

(c) 1. In criminal cases, bail cannot get their recognizance discharged, without paying costs. 5 Burr. 1461.—2. The death of the defendant after conviction, and before the day in bank, does not discharge the bail given pursuant to 5 W. & M. c. 11. 8 T. R. 409.

(d) The only case in which the courts will interfere on behalf of the bail is, where the surrender has been prevented by the act or law of our own state. 4 East, 189.

(e) If a privileged person, being arrested, gives bail, and they permit the plaintiff to proceed against them to judgment, they shall not be released. 4 Taunt. 557.

(f) 1. Where defendant gave a *cognovit* for the debt and costs, payable by seven instalments, and afterwards the principal was discharged under an insolvent debtor's act, which related to a certain day, when three only of the instalments were payable; the bail who had been fixed before passing the act, though after the day to which it related, were held liable for the whole condemnation money. 8 East, 433.—2. The bail

So where the bail have continued for many years, upon a cause removed by *habeas corpus*, without prosecution, they may be discharged. Pr. Reg. 65. (g)

So, if the plaintiff does not declare within two terms after bail filed, the bail may be discharged. Semb. Pr. Reg. 65. 71. 1 Mod. 25. 3 Mod. 274. (h)

Otherwise

are discharged where principal is made a peer of the realm. Dougl. 45.—3. Or member of the house of commons. Langridge v. Flood, Tidd, 274. 4 T. R. 190.—4. Or becomes bankrupt, and obtains his certificate at any time pending the action. 1 Burr. 244, 245. 456. Cowp. 824.—5. And in any of these cases entry of *exoneretur* will be ordered.—6. But in cases of bankruptcy, court will not relieve the bail, from the debt having been contracted while defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he may have obtained his certificate there. 8 T. R. 609.—7. And where defendant became bankrupt, and plaintiff proved his debt under the commission, but did not otherwise proceed under it, the bail were held liable, though plaintiff had laid by two years before he brought his *scire facias* against them. Hill v. Simpson, Tidd, 275. Sed vide 2 Blk. 1317.—8. But if a plaintiff, after judgment obtained, prove his debt under a commission of bankrupt sued out against the defendant, and also proceed against the bail, the latter are thereby entitled to their discharge, under st. 49 G. 3. c. 121. s. 14. and the court, on motion, will enter an *exoneratur*. 2 Taunt. 246.—9. Bail however cannot be relieved on their principal becoming bankrupt, and obtaining his certificate pending the action against him, where, from a neglect to plead his certificate, judgment has gone against him. 3 Taunt. 46.—10. And where bail being fixed with the debt, and having paid it, sued the principal and obtained judgment after a commission of bankruptcy had issued against him, but before he had obtained his certificate; and after he had obtained it, the bail in the second action applied to be exonerated, on the ground that the plaintiff, the bail in the original action, might prove under the commission by virtue of 49 G. 3. c. 121. s. 8; court refused to interfere summarily, but left the bail to their *audita querela*. 2 Mars. 37. 6 Taunt. 329.—11. If defendant be sent out of the kingdom under the alien act, K. B. will exonerate bail. 7 T. R. 517.—12. Unless they are indemnified, or have money in their hands belonging to defendant, sufficient to answer plaintiff's demand. 6 T. R. 50. 52. 246.—13. Yet not where principal is only in custody and about to be sent out of the country, whilst he is still in this country. 15 East. 457.—14. So an *exoneretur* will be entered where defendant is under sentence of transportation for a felony. 6 T. R. 247.—15. Or the defendant a seaman, being out upon bail on mesne process for a debt under 20*l.*, is impressed into the king's service. 7 East, 405. 3 Smith, 556.—16. But where defendant was in custody under a charge of murder committed in Ireland, where a bill was found by the grand jury against him, and application had been made to the secretary of state to send him over there in order to take his trial; K. B. though they granted a *habeas corpus* to bring him up in order to his surrender, would not without actual surrender exonerate the bail. 7 T. R. 226.—17. Bail will not be exonerated from the principal having become insane. 6 T. R. 135. Lofft, 617.—18. Nor where he is committed, under a crown extent, to the custody of the sheriff. 1 Mars. 166. 5 Taunt. 181. 503.

(g) If the defendant, sued in an inferior court, removes the cause to a superior court, and puts in and perfects bail therein, the bail below are discharged. If the plaintiff removes it, they are discharged *instantly*. 3 M. & S. 328.

(h) 1. That is where plaintiff does not declare against defendant in due time, so that the cause is out of court. 2 N. R. 404.—2. So if he declares against him for a different cause of action from that in the process, or affidavit for bail. 2 East, 305. 3 Wils. 61. 2 H. Bl. 278. 2 B. & P. 353. 6 T. R. 363. 7 T. R. 80. 8 T. R. 27.—3. So in the form of action. 7 T. R. 80. 2 B. & P. 353.—4. So in the plaintiff's character. 3 Wils. 61. 6 T. R. 363. 8 T. R. 416.—5. Yet where the proceedings are by bill, a variance between the writ and declaration in the amount of the debt, is not a ground for discharging the defendant on common bail. Secus where by original. 5 T. R. 402.—6. So if on joint bailable process, the plaintiff declares severally, the declaration only will be set aside, and not the bail exonerated. 1 M. & S. 55.—7. In proceedings by original in K. B., declaring in a different county from that where the action is brought, discharges the bail. 3 Lev. 235. R. E. 2 G. 2. K. B. Barnes, 116.—8. And in C. B. they are not liable where the declaration consists of several

Otherwise, if the plaintiff was stayed by injunction in chancery. R. 3 Mod. 274. (i)

So, if the bail be oppressed by irregular proceeding, the court upon motion will relieve them; as, if the proceeding be before the essoign day of the term next after the term when the process was returnable; for the defendant had all that term to give bail, and if he gives it before, the plaintiff may take an assignment, but he shall not proceed before. Mod. Ca. 226.

So by the st. 4 & 5 Ann. 16. if an action be brought on a bond or other security by the bail after an assignment to the plaintiff, the court by rule may give relief to the defendant, or the plaintiff in the original action, or to the bail, which rule shall be in nature of a defeazance to such bail-bond or other security.

So, after proceeding against the bail, if the defendant will accept a declaration in the original action, and plead to issue, and all this before trial lost, upon payment of costs, the prosecution against the bail shall be stayed.

But in such case the defendant shall plead in chief, and not in abatement. Sal. 519.

If a judgment be given by the defendant to indemnify his bail, execution shall not be taken out till the bail are damnified, though the debt is not paid. Mod. Ca. 77.

(Q 2.) By surrender of the principal.—What shall be a surrender in due time. Vide post, (R 3.)

So if the principal surrender himself in discharge of his bail (k) after judgment,

several counts, unless the plaintiff recover for a cause of action specified in the affidavit. 2 Taunt. 107.—9. But in that court, the declaring in a different county from that in which the writ issued, is not deemed a waiver of the bail. R. H. 22 G. 3. C. P.—10. Nor in C. B. is a variance between the writ and count, the *ac etiam* being in case on promises, but the declaration in debt is not a ground for entering an *exoneretur* on the bail-piece, where the sum sworn to is under 40*l*. 1 H. B. 310.

(i) Where a *cognovit* is given which affects the privilege of the bail to surrender their principal, such *cognovit* will discharge them unless given with their consent; but where their situation is not altered, nor their rights affected thereby, their liability remains unshaken. 5 T. R. 277. 1 Mars. 250. 5 Taunt. 614. 1 Mars. 59. 5 Taunt. 519. 4 Taunt. 456. 7 Taunt. 126. 2 Mars. 383. 7 Taunt. 383. 16 East. 617. 1 Taunt. 159.

(k) 1. It is not necessary in either court for the bail to justify in order to render, even after they are excepted to, or though the sheriff has been ruled to bring in the body. Ashton v. King, Tidd, 267. R. T. 35 G. 3. K. B. 5 T. R. 568. Barnes, 111. 117. 2 Blk. 958. 1179, 80. 1 H. B. 638. Wardle v. Rowland, Tidd, 267. Imp. C. P. 186.—2. And on an exception to bail, if notice be given of other bail, only one of whom justifies, and the names of the former still remain upon the bail-piece, the first bail may surrender the principal in K. B. 5 T. R. 633.; and see 2 Blk. 1179.—3. Even bail who have been rejected have in that court been held, so long as they remain upon the bail-piece, competent to make a surrender. Tidd, 267.—4. But in C. P. it is a rule that when bail above are excepted against, and cannot justify themselves, they are considered as no bail, and therefore cannot render; but other fresh bail may be put in, and before any exception taken to them, may render. 3 Wils. 59.; see 1 H. Bl. 638. 1 B. & P. 32. 1 N. R. 137. 1 Taunt. 163.—5. And in that court, bail surreptitiously put in, cannot surrender the defendant. 2 Blk. 1179.—6. In K. B. bail to the sheriff are entitled to the benefit of a render made without justifying, after the regular time of justification is expired, so as to stay the proceedings against them upon the bail-bond, upon payment of costs. 5 T. R. 401. 534. 7 T. R. 529. 2 N. R. 85.; vide 7 T. R. 297.—7. But in C. P. if plaintiff has taken an assignment,

judgment (*l*), and before a *capias* (*m*) against him be returned and filed (*n*), the bail are excused in C. B. as well as in B. R. 1 Leo. 58.

And may enter an *exoneratur* upon the bail-piece; for till such entry the discharge of the bail is not complete. 1 Sal. 98.

So if he surrenders himself after the return of the *capias* filed, before return of the *scire facias* against the bail, it is sufficient. R. 1 Rol. 333. l. 40 to 50. 334. l. 22. 2 Bul. 260. Lat. 150. 1 Brownl. 65. (*o*)

Though a writ of error was brought, and determined before the *capias* awarded. R. 1 Rol. 333. l. 55. Poph. 186. (*p*)

So if the first *scire facias* be returned *nichil*, and the bail bring in the principal in the morning of the return day of the second *scire facias*, or before, it is sufficient. R. 1 Rol. 334. l. 10. Pr. Reg. 64. 72. R. cont. Mo. 850. 3 Bul. 182. R. acc. 2 Rol. 367. Cro. El. 618. Cont. Cro. El. 738. R. acc. 2 Cro. 109. Litt. 194. Jon. 139. (*q*)

Though

of the bail-bond, and put it in suit, the bail, it seems, must justify before they can render defendant. Tidd, 268. Imp. C. B. 184. — 8. The sheriff also is entitled in K. B. to the benefit of a render made at any time before the day allowed for bringing in the body is expired. 7 T. R. 527. 8 T. R. 464. — 9. But if he be once in contempt for not bringing in the body, that contempt is not purged by the defendant's rendering on a subsequent day, though before an attachment is moved for against him. 8 T. R. 29; *sed vide* 1 H. Bl. 9. 1 B. & P. 325. 2 B. & P. 38. 5 B. & P. 563. Tidd, 267, 8.

(*l*) The defendant having put in bail, may render himself, or be rendered in their discharge, before or after judgment. Str. 198.

(*m*) 1. Before the return of the *ca. ad. sa.* the render is a matter of right, and may be pleaded. 1 Ld. Rd. 156, 7. Henley v. Medley, Tidd, 270. n. — 2. But afterwards, it is allowed by the grace and favour of the courts, and not *ex debito justitie*. R. T. 1 Ann. reg. 2. — 3. And therefore a subsequent render cannot be pleaded. Henley v. Medley. Tidd, 270. n. Barnes, 106, 7. — 4. Though, if made in time, the bail may be relieved by motion. *Ibid.* — 5. If the bail, at any time after the return of the *capias*, render the principal at a judge's chambers, and he be committed to the tipstaff, from whom he escapes or is rescued, the render is of no avail. 6 Mod. 238. R. T. 1 Ann. reg. 2. K. B. Tidd, 279.

(*n*) Cro. Eliz. 738. Ld. Rd. 157.

(*o*) 1. Which rule was afterwards extended, by permitting a render upon the return of the first *scire facias*, if the *capias* were returnable *de die in diem*. Cro. Eliz. 618. — 2. Though, if it were returnable the next term, the bail were held to a render by the return of it. *Id.* 738. — 3. But now see below.

(*p*) 1. Bail are not allowed four days to surrender their principal after the determination of a writ of error where the plaintiff has proceeded by subpoena, and error is brought before the *ca. sa.* Wightw. 79. — 2. But if pending proceedings against bail, a writ of error be allowed, the court will give the bail the same time to surrender after judgment affirmed, or writ of error non-prossed, as they would have had at the time the writ of error was allowed; and in the mean time, the proceedings against the bail will be stayed. 2 Price, 296. — 3. And the application will be granted, where the writ of error was allowed two days after the return of the subpoena *ad resp.* against the bail, and the motion not made till five days after, the fourth day being Sunday. *Ibid.*

(*q*) 1. Accord Sty. Rep. 334. 8 Mod. 32. — 2. And the rule now is, that in K. B. render may be at any time before the rising of the court, on the return day of the second *scire facias*, or of the first, where *scire feci* is returned, by bill. Ld. Rd. 157. 6 Mod. 238. — 3. Or by original in that court, as well as in C. B., at any time before the rising of the court on the appearance day, or *quarto die post* of the return of the second *scire facias*, or of the first, where *scire feci* is returned, and not after. 1 Wils. 270. 4 Burr. 2134. 3 Burr. 1360. 1 Blk. 393. R. M. 1654. s. 12. Ca. Pr. C. P. 53. Barnes, 82. 2 H. Bl. 593. — 4. And K. B. have refused to enlarge the time, on affidavit that principal could not be removed without endangering his life. 4 East, 102. — 5. Yet this seems doubtful. 13 East, 355. — 6. And further time was allowed where principal, being in custody under process of another court, the officer, to a writ of *habeas corpus* by the bail, returned that a removal would endanger his life. 16 East,

Though the surrender in the morning was only to the tipstaff(s), and he be not brought to a judge, nor committed to prison till *post meridiem*. R. 1 Rol. 334. l. 30.

And if there be an entry of the commitment upon the return day, though it was not entered till afterwards, and it appears only by examination, that it was in the morning, yet it is sufficient; for the record being, that he was committed such a day, the court will intend it in the morning, to save the bail. R. 1 Rol. 334. l. 35.

And though the bail appear at the return day by their attorney, yet the surrender may be accepted. Semb. 2 Rol. 367. 382.

If there be a surrender of the principal, though he has privilege, the bail shall be excused. R. Litt. 194. (t)

If the principal surrender himself in discharge of his bail in B. R., or be brought in by the bail, after a writ of error pending in the exchequer, which is a *supersedeas*, and the principal cannot be committed in execution by the court, yet the bail are excused, and the marshal of B. R. shall detain him in prison as a pledge, till judgment be affirmed, or disaffirmed. R. 1 Rol. 335. l. 5. R. Mo. 850. 853. R. cont. Lat. 149. Agr. 3 Mod. 87. R. Jon. 138. Ray. 100.

Otherwise in B. after error brought, and there allowed. 1 Rol. 334. l. 40. Hob. 116.

But in B. if the record be not removed before the return of the writ of error, the principal may surrender himself in discharge of the bail. R. Hob. 116. (u)

So if the defendant be taken by an extent at the suit of the king, he may be brought by habeas corpus (x), and surrendered in discharge of his bail; for the suit there was prior to the extent. R. 1 Sal. 353.

If

339. — 7. So it will be allowed upon the ground of the unwarrantable arrest and detention of the principal by a foreign enemy. 4 East, 189. — 8. So in the case where principal has become bankrupt, the time will be enlarged till after he has finished his last examination. 3 East, 145. 1 Taunt. 320. — 9. Nor has the st. 49 G. 3. c. 121. permitting a bankrupt in custody in execution to be brought before the commissioners, altered this practice. 1 Price, 74. Tidd, 268, 9.

(s) Vide supra.

(t) 1. Formerly, if defendant had become bankrupt, and obtained his certificate before the bail were fixed, the method was for the bail to surrender him; and then for the defendant to apply to be discharged, upon an affidavit, stating his having become bankrupt since the cause of action arose, and obtained a certificate of his conformity under the commission. Cowp. 824. — 2. But of late, where a bankrupt is clearly entitled to his discharge, the courts, or a judge on summons, to avoid circuitry, have ordered an *exoneratur* to be entered on the bail-piece, without the form of a regular surrender by his bail. Ibid. Barnes, 104. 2 N. R. 180. 190. Vide 8 T. R. 609. — 3. And this was allowed on motion in the K. B., where the certificate was not obtained till after the return day of the *ca. ad sa.* Cleveland v. Dickinson, Tidd, 272. Sed vide Healey v. Medley. Ibid. — 4. But where the validity of the commission is disputed, the court will direct an issue, notwithstanding the certificate, before an *exoneratur* is entered. Willison v. Smith, Ibid. — 5. And bail cannot plead the bankruptcy and certificate of their principal in their own discharge; but must apply for relief by motion. 1 B. & P. 448. Id. 450. Tidd, 272.

(u) A tender by defendant, having removed the cause from an inferior court by habeas corpus, at any time before *procedendo* actually issues, is sufficient. 16 East, 387.

(x) 1. Where defendant is at large, he may come in and render himself, or be taken, and rendered by his bail, either in court, if sitting, or before a judge at his chambers. 6 Mod. 231. — 2. And the court or judge will make an entry or minute of the render and commitment, and cause the defendant to be sent therewith, in custody of a tipstaff, to the K. B. or Fleet prison. R. T. 3 Ann. K. B. Tidd, 271. —

If the defendant be in custody by an escape warrant upon the st. 1 Ann. 6. the bail may have a writ to the sheriff, &c. to detain him in discharge of the bail, who shall return the receipt of the writ, and whether the defendant be in his custody, on pain of 50*l.*; and on such return a *reddidit se* shall be entered on the bail-piece, which shall be as effectual, as if the defendant had rendered in court.

So debt shall not be sued upon a recognizance in B. R. against bail, if they surrender the principal in eight days after full term; whereby the bail has equal advantage in debt, as in a *scire facias*. Mod. Ca. 132. 2 Mod. Ca. 340.

So in C. B. (y)

And if there be an action in B. R. upon a recognizance in C. B. the bail shall have the same rule as they would have in C. B. Mod. Ca. 132. (z)

3. And they are justified in searching the house of their principal, in order to his surrender, though it turn out that he was not therein at the time. 2 H. Bl. 120. — 4. But where defendant is already a prisoner, he must be brought up by writ of *habeas corpus cum causa*, which may be made returnable immediate. 3 Burr. 1875. — 5. A writ that will be granted as well where defendant is in custody on criminal as on civil process. — 6. Hence where he has been taken on a charge of felony, or for a misdemeanour. 7 T. R. 226. 15 East, 78. — 7. Unless he is a convicted felon. 4 Burr. 2034. — 8. So it will be granted to bring up principal confined as a lunatic. 3 Burr. 549. — 9. But not when in custody under the alien act, and on the eve of departure. 13 East, 457. — 10. And upon this writ, court will either remand him to his former custody, or commit him as a prisoner of the court to the custody of the marshal. Tidd, 271. — 11. In K. B. it is a rule, that under every commitment should be entered the state of the cause at the time of the render; if before declaration, the sum sworn to on the arrest; but if after declaration, these words should be added, "declaration filed or delivered, issue or interlocutory judgment signed," as the case is; if after final judgment in debt, the debt and damages, in other cases the quantum of damages. R. E. 8 G. 3. K. B. — 12. In C. B. the filacer attends with his book at the judge's chambers, and takes the render. — 13. And where it was made upon the last day, the court ordered the hour of the day to be entered, that it might appear whether the surrender was made before the rising of the court. Barnes, 69. — 14. As it must be. 2 H. Bl. 593. 3 Burr. 1360. 1 Blk. 393. Tidd, 271.

(y) 1. In K. B., if plaintiff proceed by action of debt on the recognizance, the render may be made by the space of eight entire days, in full term, next after the return of the latitat, or other process against the bail. R. T. 1 Ann. reg. 1. K. B. 1 Salk. 101. 1 Ld. Rd. 721. 6 Mod. 132. — 2. Of which an intervening Sunday must be reckoned one. 14 East, 537. — 3. And if there be not the full number of days in the same term, they must be made up in the following one. — 4. Where an action was commenced, and afterwards discontinued, and then the bail rendered the principal, before the bringing of a new action, the court held the render good, it being before the return of the process in the suit. 2 Str. 915. — 5. So, where plaintiff sued the bail on their recognizance, who did not render the principal within eight days, and then the plaintiff died, and his executors brought another action against the bail, it was ruled, that the bail had eight days from the return of the process in the second action, to render. 8 T. R. 422. — 6. In C. B. the render must be made before the rising of the court, on the *quarto die post* of the return of the process. Ca. Pr. C. P. 53. Barnes, 82. 2 H. Bl. 593. R. M. 1654. s. 12. C. P. 2 H. Bl. 118. — 7. Which too must be served on the bail four days at least before the return. Ca. Pr. C. P. 18. Pr. Reg. 83. Barnes, 62. — 8. And in that court they are allowed the same time for rendering the defendant on an attachment of privilege as on a common *capias*. 2 H. Bl. 117. — 9. And if a bail be seized with process upon his recognizance, and die before the *quarto die post*, and fresh process issue against his executors, they have until the *quarto die post* of the return of the second writ, to surrender the principal. 1 B. & P. 61. Tidd, 269, 270.

(x) Or as if the recognizance had been taken in K. B. 7 T. R. 355.

So.

So in debt upon a recognizance of bail, the bail shall have advantage of the surrender at any time before the return of the latitat. 1 Sal. 101. Carth. 515.

If the principal surrender himself before the return of the *scire facias*, but does not give notice (a) to the plaintiff, nor enter an *exoneratur* upon the bail-piece, and upon a *scire feci* there is judgment against the bail, they shall not be aided upon motion, without an *audita querela*. R. 1 Sal. 101.

Q 3.) What not.

But a surrender after the first *scire facias* returned *scire feci*, and filed, is too late. 1 Rol. 334. l. 5.

Or if the first *scire facias* be returned *nihil*, in the afternoon of the return day of the second *scire facias*. 1 Rol. 334. l. 30. Yet Cro. El. 618. says, that a surrender before judgment in the second *scire facias* is sufficient.

So a surrender after a plea to the second *scire facias* is too late, and cannot be made without the consent of the plaintiff. R. Pal. 392.

So after error brought, the surrender of the principal does not discharge the bail in error; for their recognizance is, to prosecute the writ of error with effect, or pay the condemnation with costs. R. 2 Cro. 402. 3 Bul. 191. 1 Rol. 392. D. 3 Mod. 87.

Yet after execution against the bail, the principal was accepted in discharge of the bail; where it appeared, that the principal absconded before by covin between him and the plaintiff. R. 1 Bul. 43.

(Q 4.) How the surrender shall be recorded.

If the defendant surrender himself in discharge of his bail, it ought to be entered upon record. 1 Rol. 337. l. 10. Hob. 210.

And therefore, if a surrender be pleaded, he ought to conclude, that he is ready to aver it by the record. Lat. 149. Hob. 210. Mo. 888.

And the entry ought to be, *quod reddidit se in exonerationem muncipalium suorum*. Hob. 210.

And if the entry says, that the surrender was in court *die non juridico*, it is void. 1 Rol. 392. Poph. 186.

And upon a certificate, that the defendant is in custody, the master of the office writes, *reddidit se*, upon the bail-piece, which discharges it. Pr. Reg. 64.

Otherwise the bail would be charged, though the defendant be in prison. Pr. Reg. 64. (b)

So

(a) Vide infra.

(b) 1. In order to discharge the bail in K. B., an *exoneratur* must be entered on the bail-piece. — 2. To effect which, the bail-piece, if not already got, should be obtained from the judge's chambers, and a certificate from the prison, that defendant is in custody; which being carried to the master, he will enter an *exoneratur* on the bail-piece, which should then be filed. Tidd, 273. — 3. For, if the bail-piece be filed without an *exoneratur*, the bail remains liable, though the defendant be actually in prison. R. T. 1 Ann. reg. 2. K. B. 1 Salk. 98. 8 Mod. 282. — 4. Yet, where the bail-piece has been previously delivered out to be filed, to the plaintiff's attorney, who neglects to file it, he cannot proceed against the bail, for want of an *exoneratur*. 8 Mod. 280. Barnes, 68. — 5. And where the render is in other respects regular, the court will order an *exoneratur* to be entered on the bail-piece, upon paying the costs that have accrued subsequent to the render. Say. Rep. 7, 8. 1 Burr. 409. — 6. In C. B. the *exoneratur* is entered in the

So if the bail surrender the principal after the return of the *capias*, at a judge's chamber, and he escape before he has continued two days in custody, the bail shall not be discharged. Mod. Ca. 238. (c)

So, if they do not give notice (d) of the surrender to the plaintiff, they shall pay the charges of the plaintiff thenceforwards, before their discharge. Mod. Ca. 238. (c)

But the surrender will be good, though no notice be given. Mod. Ca. 238.

And though he escape, or he rescued after being two days in the custody of the marshal. Mod. Ca. 239.

So, if he escape at any time after the surrender before the return of the writ. Mod. Ca. 238. (f)

If the plaintiff, or his attorney, be in court at the time of the surrender, he ought to declare his acceptance or refusal to take him in execution, of which there shall be an entry upon the record. 1 Rol. 337. 1. 15. Hob. 210. Pr. Reg. 66. Cro. El. 22. 1 Leo. 58.

If they are not in court, he shall be committed till the plaintiff or his attorney be summoned to make his election. 1 Rol. 337. 1. 20. Hob. 210. 2 Rol. 367. Mo. 888.

If they are dead, a *scire facias* shall go against the plaintiff's executor, or administrator, to make election. 1 Rol. 337. 1. 25. Per Hob. 210.

And, whether the plaintiff or his attorney accept or refuse, shall be entered upon the record. Hob. 210. Mo. 888.

And such refusal does not bar the plaintiff of his execution by *capias* *ad satisfaciendum* afterwards. Per Hob. 210.

(Q 5.) By the death of the principal.

Vide post, (R. 5.)

If the principal die before a *capias* against him, the bail shall be excused. R. Hutt. 47. Mo. 432. Cro. El. 597.

the filacer's book, on making the render at the judge's chambers. Imp. C. P. 555, 556. — 7. And in K. B. entry of the render must be made in marshal's book kept at K. B. office. R. T. 5 Ann. K. B. 1 Salk. 272, 3. 1 Str. 1215, 1226. 2 Burr. 1049. 2 Smith, 245.

(c) Vide supra.

(d) 1. The defendant being rendered, notice thereof should be given without delay, to plaintiff's attorney. 7 T. R. 528. 8 T. R. 223. 5 B. & P. 252. — 2. And in K. B. an affidavit should be made of the service of such notice. R. T. 1 Ann. reg. 2. K. B. 6 Mod. 238. 8 Mod. 281. 4 Bac. Abr. 420, 421. 5 T. R. 368. 8 T. R. 222. — 3. Secus in C. B. Imp. C. P. 556. — 4. But the notice need not be given before he rising of the court on the day of the render. Tidd, 273. 5 East, 533. Vide 2 Smith, 242.

(e) 1. If the principal be surrendered in time, but the bail omit to give regular notice, in consequence of which plaintiff proceeds upon the bail-bond, bail may apply to set aside the proceedings, on payment of costs, even after execution levied, and the money is in the sheriff's hands. 8 T. R. 222. — 2. If plaintiff proceed after due notice of render, without more, he does it at his own cost and peril, since the rule of K. B. Trin. 1 Anne, is unconditional, and not on payment of the costs due. 3 East, 306. — 3. If a question of costs, for instance, turn upon whether the plaintiff knew that the defendant was in custody, it will be presumed that he did not, where no notice of surrender was given. 3 R. & P. 232

(f) Vide supra.

So,

So, if error be brought after judgment before a *capias*, and the principal die pending the error. R. Hutt. 47. Dub. Lat. 149.

So, if the principal die before a *capias* against him be returned and filed (g), the bail shall be excused. 1 Rol. 336. l. 15. 25. 449. l. 40. 45. 53. 450. l. 15. R. Jon. 139.

But the death of the principal, after a *capias* against him returned *non est inventus*, and filed upon record, does not excuse the bail, though he died before a *scire facias* against the bail, and if the bail had then brought in the principal, they would have been discharged. R. 1 Rol. 336. l. 15. R. Mo. 775, 6. R. 2 Cro. 165. 1 Rol. 450. l. 5. Jon. 139. 2 Jon. 228.

So the death of the principal before judgment against him, is of no avail; for the bail shall not take advantage of the error in the first judgment. Per Gawdy; Wray cont. 2 Leo. 101.

(Q 6.) If the debt be satisfied by the principal.

Vide post, (R 6.)

So, if the principal pay (h) the sum recovered against him, after judgment or before, the bail shall be excused. 2 Lev. 212. Cro. El. 132. 233.

As, if he pay it to the sheriff, being taken upon a *capias ad satisfaciendum*. Dub 1 Rol. 335. l. 45.

So, if error be brought, and pending that, the principal pays the debt; the bail in error shall be excused, though the judgment be afterwards affirmed. Cont. 1 Rol. 335. l. 10. If he release the debt acc. post, (Q 7.)

But if the principal after judgment pay a less sum in satisfaction, and the plaintiff accepts it, the bail are not discharged; for a less sum cannot be a satisfaction. R. 2 Lev. 212. R. 1 Rol. 335. l. 50.

So, if there be judgment against A. in trespass in B. R. and judgment against B. for the same trespass in C. B., the bail for A. in B. R. upon a *scire facias* against them, cannot plead the judgment against B. and satisfaction thereupon. R. 1 Rol. 335. l. 25.

So it is no plea, that the principal has paid after judgment, if they do not shew a payment upon record. R. Cro. El. 132.

Otherwise, if they plead payment before the day in the recognizance. Cro. El. 233.

(g) If defendant die after the return of the *ca. sa.*, but before it is filed, the bail are fined. 6 T. R. 284.

(h) 1. As to whether a *cognovit* by the principal discharges the bail, vide supra. — 2. Taking bills from principal, with an agreement that plaintiff may still proceed, does not discharge him. 7 Taunt. 126. — 3. But plaintiff, after final judgment, having taken bills payable at a future day, in satisfaction of the debt, the court discharged the bail on payment of costs, though the application was not made till the fourth term after judgment signed. 2 Mars. 383. 7 Taunt. 333. — 4. It is no ground, however, for setting aside judgment against bail, that plaintiff has accepted a composition from principal, and suspended the execution of a *ca. sa.* which had been issued against him; though it were without the knowledge or consent of the bail. 1 Mars. 250. 5 Taunt. 614.

(Q 7.) If it be released, or discharged.

So, if the plaintiff in the original action after judgment releases the debt, and all judgments, executions, and demands to the defendant, the bail shall be excused. R. 1 Rol. 336. l. 35.

So, if after judgment and error brought, and before judgment affirmed, the plaintiff in the original action release the debt to the defendant, and afterwards the judgment be affirmed; the bail in the writ of error shall be excused. Semb. 1 Rol. 335. l. 20. R. 2 Bul. 232. 2 Cro. 401. Mo. 852.

So, if the sheriff release to the bail, after a bond by them for the defendant's appearance, this release is a good bar in an action upon the bond in the name of the sheriff. R. 2 Vent. 131.

But a release to the bail of all demands, before judgment, does not discharge them. R. 2 Bul. 231. 5 Co. 70. b. Mo. 469. Cro. El. 579.

So, if there be an action by an administrator *durante minoritate*, and bail given to the administrator, and after judgment, the executor attains the age of 17; this does not discharge the bail, but the plaintiff may afterwards sue a *scire facias* against them. R. 2 Lev. 37.

(R) Proceeding against bail.

(R 1.) By *scire facias*. — When it shall issue.

Vide in Pleader, (3 L 1, &c.)

After judgment against the principal, if he does not pay the condemnation, nor surrender himself to prison, a *scire facias* (i) goes against the bail. Lut. 1269. 1279.

And debt does not lie upon the recognizance, but only a *scire facias* against the bail. Ray. 14. Cont. 1 Rol. 600. l. 15. but there error was brought; and afterwards acc. R. in C. B. Trin. 13 Ann. that debt does lie. R. Mod. Ca. 159. Debt was brought. 2 Cro. 45. 97. Vide in Dett, (A 3.)

Yet after judgment against the bail in a *scire facias*, debt lies upon this judgment. R. 1 Rol. 600. l. 5.

But if a *scire facias* goes against the bail (k), before a *capias* issued (l)

(i) 1. On staying proceedings in *debt* on the recognizance, the bail must pay the costs in that, as well as the debt and costs in the original action, though they apply within the time allowed them for surrendering the principal; and on that account it is in general more advisable to proceed against the bail by debt, than by *scire facias*, wherein by st. 8 & 9 W. 3. c. 11. no costs are allowed, unless they appear and plead, or join in demurrer. — 2. In debt too, the plaintiff may recover damages for the detention of the debt, which he cannot do in *scire facias*. 3 Burr. 1791. — 3. But as a copy of the process must be served in debt, if the bail be out of the way, or the plaintiff do not mean to give them notice, he must proceed in *scire facias* on the recognizance. Tidd, 1045.

(k) That is, bail to the action; for with respect to bail in error, since a render will not excuse them, there is no occasion to sue out a *ca. sa.* in order to proceed against them. Tidd, 1047.

(l) The *ca. sa.* should be directed to the sheriff of the county where the original action was laid. Tidd, 1043.

against the principal, and returned (*m*), it is error. R. Cro. Car. 481. 1 Rol. 333. 1. 30. D. Lut. 1273. 4 Leo. 36. R. Mo. 432. Cro. El. 597. Poph. 186. (*n*)

So, if the *capias* does not issue regularly: as, if it was above a year after the judgment, without a *scire facias*. 2 Jon. 96.

Yet it need not be mentioned in the *scire facias* that a *capias ad satisfaciendum* has issued. D. Lut. 1273. Mo. 775. Poph. 186. Semb. cont. R. acc. 2 Cro. 97. R. Lut. 1281.

And if a *capias* does not issue, the bail shall not be discharged, without writ of error. 4 Leo. 36.

Or, by *audita querela*. 1 Rol. 309. 1. 5. Cro. El. 597. Mo. 432.

So, if a *capias* issues against the bail before a *scire facias*, it is error. R. Cro. Car. 561.

And though a custom be alleged, to charge the bail in execution upon the return of a *capias ad satisfaciendum* against the principal, without a *scire facias* against them, it is void. R. Cro. El. 185. 2 Leo. 29. D. Pal. 567.

So, if a *scire facias* issues, before judgment against the principal, it is error. 2 Leo. 1.

And therefore, if the first judgment be a *videtur curia*, and not by a *consideratum est*, the *scire facias* against the bail is erroneous, for *videtur curia* is not any judgment. R. Cro. El. 145. 2 Leo. 1.

And though judgment be afterwards given against the principal, the judgment in the *scire facias* stands reversed. Cro. El. 215. 2 Leo. 2.

But error in the judgment against the principal, is not a cause for reversal of the judgment in the *scire facias* against the bail. 2 Leo. 101. R. Cro. Car. 481. 561.

And the bail cannot join with the principal in a writ of error. Vide in Abatement, (E 15.) R. Pal. 567.

Nor can they have a writ of error, *tam in redditione judicii*, against the principal, *quam in redditione judicii*, against the bail, *et executionis superinde*. Per 2 J. Jones cont. Cro. Car. 481.

Otherwise, if the writ of error by the bail only, recites the first judgment, and assigns errors in the judgment against the bail only. Cro. Car. 481, 482.

And if the judgment against the bail be bad for infancy, &c. or other error in fact, the bail shall take advantage of it by *audita querela*. R. Yel. 155.

(*m*) 1. If the principal be already in custody of the sheriff in another action, the sheriff will not be justified in returning *non est inventus*. Tidd, 1043. 1 N. R. 251. — 2. But otherwise this return will be good, though the plaintiff knew where to find the defendant. Sillitoe v. Wallace, Tidd, 1043. — 3. And so as the *capias ad satisfaciendum* be regularly sued out and returned, it may be filed at any time; the filing being mere matter of form. 1 Lev. 225. infra (R 4.) — 4. So that if the principal die after the return of the *ca. ad sa.* and before the return be filed, the bail are fixed, and the court will not stay the filing of the return in favour of the bail. Field v. Lodge, Tidd, 1043. 6 T. R. 284. — 5. The proceedings against the bail may be commenced on the return day, or by original on the *quarto die post* of the return of the *ca. sa.* against the principal. 8 T. R. 628. Et vide 2 Ld. Rd. 1567. 2 Str. 866.

(*n*) W. Jones, 29. 139. Sty. Rep. 281. 288, 323. Ld. Rd. 156. 10 Mod. 267. R. E. 5 G. 2. reg. 3. a. K. B.

If the *scire facias* against the principal after judgment has only four days between the *teste* and return, and a *scire facias* be brought against the bail, proceedings shall be stayed, upon motion by the bail. 2 Mod. Ca. 305.

But after a *scire facias* against bail, error brought of the principal's judgment is not a *supersedeas* to the proceeding in the *scire facias*. R. 1 Rol. 371. Poph. 186.

(R 2.) In what manner the *scire facias* shall be sued.

If bail in C. B. be taken by a judge in Fleet-street, which is in London, and afterwards filed at Westminster, the *scire facias* issues from Middlesex. 2 Rol. 382. Hob. 195, 6. Sal. 600. 564.

Or, from London. R. 1 Rol. 891. l. 20. 35. Al. 12. Hob. 196. Sal. 600. (o)

But a *scire facias* upon a recognizance of bail in B. R. must be in Middlesex; for it does not bind till filed. R. Sal. 600. 564.

So it shall always be entered as taken in court. Sal. 564.

If there be bail for two defendants in several terms, there shall not be a *scire facias* against them jointly. Lat. 183. (p)

But upon motion they may be filed both of the same term. Lat. 183.

If there be bail in York, and transmitted to Westminster, the *scire facias*, may be in the one county, or the other. R. Lut. 1287.

If there be bail in C. B. and afterwards the judgment is affirmed in B. R. the recognizance shall be removed thither by certiorari; for the *scire facias* must issue out of the court where the judgment was given. R. 4 Mod. 104. Vide Pleader, (3 L 3.)

The *scire facias* ought to pursue the recognizance; and therefore, a variance from it is error (q); as, if it mistakes the sum. R. Cro. El. 855.

So it ought to pursue the judgment. Vide Pleader, (3 L 3.) (r)

And

(o) 1. It has been laid down that where the bail is enrolled as taken in Middlesex, the *scire facias* shall be in Middlesex; but where in any other county, *sci. fa.* may be in that county, or in that in which the enrolment is. 2 Blk. 768. Barnes, 96. 207. — 2. That a *scire facias* on a bail-piece remaining in Middlesex, must be sued out in Middlesex, though the original cause of action was in London. 1 Burr. 409. — 3. And lately, that the *scire facias* is properly sued in that county in which the recognizance is recorded, though the action against the principal by original, and proceedings thereon, were in another county. 5 East, 461. 2 Smith, 14.

(p) 1. In debt the plaintiff may bring one action against all the persons bound in the recognizance, or several actions against each of them. Infra. — 2. But one *scire facias* seems in all cases to be sufficient; and the recognizance being joint and several, the execution may be several, though the *scire facias* was joint. Bac. Abr. tit. Execution G. 1 Lev. 225. 1 Sid. 339. Tidd, 1044.

(q) Where a *scire facias* was brought against three persons as bail, upon a recognizance acknowledged by them and the principal jointly, the writ abated, because this being founded on a record, the plaintiff ought to set forth the cause of the variance from the record, as that one was dead. Aleyn, 21.

(r) 1. After setting forth the judgment, it states that the principal has not paid the debt or damages recovered, nor rendered himself to the prison of the marshal or warden. 2 Salk. 439. 3 Salk. 320. Ld. Rd. 804. — 2. And in K. B. concludes by requiring the sheriff to make known to the bail, that they be before the king at Westminster on a day certain, by bill or by original, on a general return day, wheresoever, &c.

And if a recognizance be taken before commissioners, &c. it ought to shew how it was transmitted, and the record. Lut. 1283.

So it ought to pray execution; and therefore, if after *quare executio* the words *feri non debet* are omitted, it is bad. Lut. 1282.

So, if there be a recognizance upon an original in the county of Y. and he afterwards declares in the county and city of Y. and has judgment upon it, the bail shall not be charged; for though he may change the county, yet he thereby loses the bail. R. 3 Lev. 235.

But if there be a recognizance of bail upon a *clausum fregit*, and the action is by an executor or administrator, whereby it does not appear, but that the bail was in an action in his own right, yet it will be well; for it is the usual course to take bail upon the *clausum fregit*. Lut. 1281.

So, if it pursues the recognizance, it is sufficient: as, if A. and B. are bail for C. and D. only, in an action against C. D. and F., and the *scire facias* says, that C. and D. have not satisfied the judgment, it is sufficient, though it does not say, that F. has not satisfied; for the bail was only for C. and D., and it is enough to shew that they have not satisfied; and if F. has paid, it shall be shewn on the other side. R. 2 Rol. 276. l. 35.

So, if it does not say that C. and D. *nec eorum aliquis* has satisfied; for if either has paid, both have satisfied the judgment. R. 2 Rol. 276. l. 35.

So it is not necessary after recital of the recognizance to conclude, *prout patet per recordum*. Lut. 1282. (s)

(R 3.) Pleas to a *scire facias*.—Surrender of the principal.

To a *scire facias* the defendant may plead, that the principal surrendered himself in discharge of his bail. Vide ante, (Q 2.) Adm. 3 Lev. 152.

&c. to shew if they have or know of any thing to say for themselves, why the plaintiff ought not to have his execution against them, for the debt or damages aforesaid, by bill or by original, for the sum acknowledged, according to the force, form, and effect of the recognizance, if it shall seem expedient for him so to do. Tidd, 1045, 1046. — 3. In the C. B. the bail are required by the writ, to be before the king's justices at Westminster on a general return day, to shew, &c. why the penalty of the recognizance should not be made of each of their lands and chattels, &c. Ibid. — 4. The *scire facias* against the principal is in *hac parte*, or that he do and receive what the court shall consider of him in *this* behalf. — 5. But against the bail, it is in *ex parte*, or that they do and receive what the court shall consider of them in *that* behalf. 1 Ld. Rd. 393. 2 Salk. 599. sed vide Ld. Rd. 532. — 6. An averment that although plaintiff recovered judgment, is equivalent to averring that he did recover. Barnes, 431.

(s) 1. But a declaration in *scire facias* against bail must aver that the recognizance is of record. 2 N. R. 103. — 2. Four days exclusive between the teste and return of the *scire facias* against the bail are sufficient where there is only one *scire facias*, and where the proceedings against the principal are by bill. 4 T. R. 663. — 3. Fifteen days between the teste of the first and return of the second *scire facias* are sufficient. 2 Str. 1139. 2 Blk. 922. — 4. The summons in *scire facias* may be served on the return day, at any time before the rising of the court, but not afterwards. 2 T. R. 757. as explained in 1 East, 86. — 5. To fix the bail, the alias *scire facias* must lay in the sheriff's office the last four days before the return. 4 T. R. 583. 13 East, 588. — 6. And in K. B. it is sufficient that it has been duly entered on the files in the sheriff's office, though no entry of the writ, notifying that it is out, has been made by the officer in the *scire facias* book kept therein, that being a private book only. 3 East, 570. — 7. The return by the sheriff of *scire facias* is not conclusive upon the bail, so that they may shew that they have not been duly summoned. 2 T. R. 757. — 8. In rules to appear and plead in *scire facias*, a Sunday does not count, though it be not the last day. 11 East, 271.

That

That a *capias ad satisfaciendum* issued against him, upon which he was taken in execution. Lut. 1270.

And he need not say, that he continued in execution; for the bail will be discharged, if he was ever taken in execution. Lut. 1273.

And to this the plaintiff ought to reply, that *non est inventus* was returned upon the *capias ad satisfaciendum*, and traverse that he was taken upon it. Lut. 1273.

Or, that another *capias ad satisfaciendum* was returned *non est inventus*, and traverse, that this writ issued. Lut. 1273.

Or, if the defendant pleads, a *capias ad satisfaciendum* returned *non est inventus*, and a taking upon a *testatum capias ad satisfaciendum*; he may reply, that no such *testatum capias ad satisfaciendum* issued, without a traverse. R. Lut. 1273.

And the defendant may plead a surrender, without saying, that it was before a *capias* against the principal returned; for if it was not, it shall be shewn on the other side. R. Jon. 139.

But the defendant cannot plead, that the plaintiff had the principal in execution in the stannary court, whereby he could not surrender him; for the bail might remove him by habeas corpus. R. Mo. 400. Per 2 Judg. 2 Rol. 136.

So, if he pleads a surrender, he ought to conclude, *proul patet per recordum*. R. 3 Lev. 152.

So he cannot plead a surrender in debt upon a recognizance, yet he shall have advantage of it. 1 Sal. 101. Vide ante, (Q 2.)

(R 4.) No *capias ad satisfaciendum* against him.

So the bail may plead, that no *capias ad satisfaciendum* issued against the principal *secundum cursum curiæ*. Lut. 1285. Tho. 282. Vide ante, (R 1.)

And the *capias ad satisfaciendum* ought to have eight days between the teste and return (*t*); otherwise, upon motion, it shall be superseded, but they shall not be helped upon demurrer. R. Sal. 602. (*u*)

But if a *capias ad satisfaciendum* issued, it is well, though it was not delivered to the sheriff before the *scire facias*. R. Lut. 1287.

So, if it issued, it will be a departure, if the defendant rejoins, that there was error brought before the return and filing. R. Mod. Ca. 139.

So, if it issued, and was returned, though the return was not filed before the *scire facias*, it is good. R. 1 Lev. 225. Semb. 2 Cro. 98.

So, if it be tested after the year, and no *scire facias* appears. R. Mod. Ca. 304.

(*t*) 1. In K. B., where proceedings are by bill, there must be eight days between the teste and return of the writ. 2 Salk. 602. Ld. Rd. 1177. R. E. 5 G. 2. reg. 3 a. K. B. — 2. Where by original fifteen, this being a case excepted out of the statute 15 Car. 2. st. 2. c. 2. s. 7. Tidd, 1043. — 3. And, in order to charge the bail, it must lie four days exclusive in the sheriff's office. 2 Salk. 599. R. E. 5 G. 2. reg. 3 a. K. B. — 4. Which must be the last four days before the return. 15 East, 588. — 5. And be made returnable, like the former proceedings, on a day certain, or general return day. — 6. So, in the C. P. there must be fifteen days between the teste and return of the *ca. sa*. Barnes, 76. — 7. Which must be tested in or after the term in which the judgment was signed against the principal; and therefore where it was tested of a prior term, the court set aside the proceedings against the bail. 1 H. Bl. 74. Imp. C. B. 539. — 8. In C. P. also, the writ must lie in the sheriff's office four days exclusive, before it is returnable. Ca. Pr. C. P. 34. Barnes, 61. Tidd, 1043.

(*u*) Ld. Rd. 1177.

(R 5.) Death of the principal.

So he may plead, that the principal died before a *capias* returned, and filed against him. R. Hutt. 47. Vide ante, (Q 5.) Acc. 2 Leo. 101. Moy. Precedents, 177. R. Jon. 29. 139. Tho. Ent. 280.

• But the defendant in his plea ought to shew the time of his death. R. 2 Cro. 97.

And the court requires, that the defendant do swear to his plea. 2 Leo. 101.

And if there was an *alias capias*, the plea shall say, that he died before the return of any *capias*. R. 5 Mod. 167.

If the plaintiff replies to such plea, he ought to shew when the *capias* issued, and traverse the dying before. R. Carth. 4.

(R 6.) Satisfaction by the principal.

So the bail may plead payment or satisfaction of the judgment against the principal. Vide ante, (Q 6.) R. 1 Rol. 336. l. 35.

As, that the defendant was taken by a *capias ad satisfaciendum*, and detained *quousque* satisfaction, *prout per breve & retournum*, &c. Tho. Ent. 282.

But payment is no plea, unless he allege payment upon record. R. 2 Leo. 213. R. Cro. El. 132. Cont. *quoad* the bail, though not *quoad* the party himself. Cro. El. 233.

Unless he allege the place of payment. R. 1 Mod. 24. 1 Vent. 49.

(R 7.) Demurrer for variance.

So upon a *scire facias* against bail, if there be a material variance in the recognizance upon record and the recital in the writ, the defendant may demand *oyer*, and afterwards demur. Lut. 1280.

What will be a variance, vide ante, (R 2.)

(R 8.) *Nul tiel record*.

So he may plead *nul tiel record* of the recognizance aforesaid. Tho. Ent. 285. Thes. Brev. 265. Off. Brev. 281.

So, if the *scire facias* varies from the judgment, the defendant may plead *nul tiel record*. (x)

(R 9.) By action of debt.

So debt lies upon a recognizance given by bail. Vide Dett, (A 3.)

And the plaintiff may declare against all the bail jointly, or each severally. 2 Mod. Ca. 295.

(R 10.) Judgment.

The judgment upon a *scire facias*, or debt brought upon a recognizance against bail shall be, *quod quærens habeat executionem*.

But the judgment against the bail shall not be, *quod dampna recuperet occasione dilationis executionis*, though the st. 8 & 9, W. 3. gives costs to the plaintiff in a *scire facias*. R. 1 Sal. 208.

(x) Nor shall a *scire facias* against bail be amended. Str. 1165. Vide in Amendment.

(R 11.) How execution shall be.

If there be judgment against the principal, and after a *capias* against him returned, judgment also against the bail, the plaintiff may sue execution against the principal, or against the bail. R. 2 Cro. 320.

And if he has one of the bail in execution, he may afterwards sue execution against the other. R. 2 Cro. 320. 2 Bul. 68.

And though there was a *scire facias* against both, he may sue execution against one only. R. 1 Sid. 339.

And if he has execution against the bail, but has not a satisfaction, he may afterwards have execution against the principal. Semb. cont. 2 Cro. 320. R. acc. 2 Cro. 549. R. 1 Sid. 107. Cont. 2 Bul. 68. Vide Execution, (H).

But if the principal be in custody, he shall not have execution against the bail. 2 Cro. 320. R. cont. 2 Jon. 75. 1 Vent. 315. no judgment. 2 Mod. 312. but there it appears, that only one of the principals was in execution. 2 Lev. 195.

Or if the principal ever was in custody. Lut. 1273.

Yet, if there be execution first against the bail, he may afterwards take execution against the principal, and have both in execution together. R. 1 Vent. 315.

Execution against the bail upon a recognizance in C. B. being for a sum certain, ought to be by *feri facias* or *elegit*. 2 Cro. 450.

If there be a *scire facias* and judgment against all the bail, execution may be against one of them, without the others; for it follows the nature of the recognizance, which was joint and several. R. 1 Lev. 226. Vide Execution, (H. — I. 1, &c.)

So, it may be against the person of the bail (y) by a *capias ad satisfaciendum*, as well as against his goods. R. 1 Lev. 226. to be the course of the court in B. R. Acc. 1 Rol. 897. l. 35. 2 Cro. 450. Vide Execution, (C 9.)

But a *capias ad satisfaciendum* does not lie against the bail. Lit. 238. Semb. 1 Rol. 600. l. 5. R. that it does not lie, where there is a judgment in a *scire facias* upon a recognizance upon C. B. 1 Rol. 897. l. 40. 2 Cro. 450, 1.

So it does not lie against bail upon a recognizance in an inferior court. R. 1 Rol. 897. l. 45.

So it does not lie against bail in B. R. upon a writ of error in the exchequer; for this is out of the course of the court. R. 1 Rol. 898. l. 5.

If there be execution of the lands of the bail, this relates to lands which he had at the time of the recognizance made, though they are aliened afterwards.

And this in B. R. as well as in C. B. Per two J. Hought. cont. Poph. 132. 2 Cro. 449.

(y) So against bail in error. Str. 822.

BAILIFF.

Vide ACCOMPT, (A 3. — E 4.) — FRANCHISES, (F 22.) — JUSTICES OF PEACE, (D 7.) — LEET, (M 2.)

BANK LE ROY.

Vide COURTS, (B 1, &c.) — PLEADER, (C 3. 8, &c. — 3 B 3.)

BANKRUPT.

(A) Who may be a bankrupt. p. 67.

(B) Who not. p. 70.

(C) Act of bankruptcy. p. 73.

(C 1.) What shall be. — Concealment of himself. p. 73.

(C 2.) Fraudulent arrest, &c. p. 76.

(C 3.) Continuance in prison. p. 77.

(C 4.) Fraudulent outlawry. p. 78.

(C 5.) Non-payment, &c. after suit. p. 78.

(C 6.) Escape, or covinous bail. p. 79.

(C 7.) Protection, or bill, for delay. p. 79.

(C 8.) Fraudulent conveyance. p. 79.

(C 9.) To what time it shall relate. p. 83.

(D) Commission.

(D 1.) How it issues. p. 87.

(D 2.) Who shall take advantage of the commission.
p. 98.

(D 3.) Who are creditors. p. 99.

(D 4.) The power of the commissioners — for discovery of the bankrupt. p. 114.

(D 5.) And of the bankruptcy. p. 117.

(D 6.) For discovery of his estate — by examination of the bankrupt. p. 117.

(D 7.) Of his wife. p. 119.

(D 8.) Or, of others. p. 120.

(D 9.) By seizure of his effects. p. 121.

(D 10.) For disposal of his estate — what lands, and goods — all his real estate. p. 122.

(D 11.) Though a joint purchaser with his wife, &c.
p. 124.

- (D 12.) Though conveyed to his children, or trustees. p. 125.
- (D 13.) Though seised only in tail. p. 125.
- (D 14.) Though he has only an equity of redemption. p. 125.
- (D 15.) Though it descends after his bankruptcy. p. 125.
- (D 16.) All goods, and debts. p. 125.
- (D 17.) Though he has only the disposition by consent of the owner, &c. p. 126.
- (D 18.) What not—Lands sold *bona fide* before the bankruptcy. p. 129.
- (D 19.) Or, which he had as trustee. p. 130.
- (D 20.) Or, upon which an execution was executed. p. 132.
- (D 21.) Or, which were settled upon the marriage of a son, &c. p. 132.
- (D 22.) Debts, and goods, &c. p. 133.
- (D 23.) In what manner the sale shall be. p. 133.
- (D 24.) Assignee of the bankrupt.—How chosen. p. 134.
- (D 25.) What he ought to do. p. 136.
- (D 26.) What interest he shall have. p. 140.
- (D 27.) What power to discharge debtors. p. 141.
- (D 28.) How the assignment shall be made. p. 145.
- (D 29.) What remedy the assignee shall have. p. 146.
- (D 30.) Distribution—shall be equal. p. 152.
- (D 31.) At what time. p. 154.
- (D 32.) The advantages of the bankrupt.—He shall have information how his estate is disposed. p. 155.
- (D 33.) Shall not be arrested when he attends the commission. p. 156.
- (D 34.) Shall be discharged from other debts. p. 157.
- (D 35.) And shall plead it generally. p. 160.
- (D 36.) Shall have a share of the net produce. p. 162.
- (D 37.) But the bankrupt shall have no advantage—unless he has his certificate allowed. p. 162.
- (D 38.) If he have given extravagant portions to his children, or lost at play. p. 166.
- (D 39.) How a commissioner, &c. may plead. p. 167.
- (D 40.) Expences of the commission. p. 167.
- (D 41.) When the commission may be superseded. p. 168.

(A) Who may be a bankrupt.

By the st. 13 Eliz. 7. if any person using a trade, or seeking a living by buying and selling, become bankrupt (z), the lord chancellor, on complaint, &c. shall by commission, assign such, &c. who at discretion may take order with the body, lands, and goods of the offender (a) for satisfaction of his creditors, rate and rate-like, &c.

By the statutes 13 Eliz. 7. 1 Jac. 15. and 21 Jac. 19. a bankrupt may be, every one who uses the trade of merchandize, or seeks his (b) or her trade of living by buying and selling.

Though it be a very inferior trade, if he gets his living by it.

As a vintner.

Brewer.

Dyer. (c) 2 Cro. 585. (d)

Though he does not sell the same wares which he buys, but converts them to saleable commodities, and then sells. (c)

As

(z) 1. Whether a man is a trader within the bankrupt laws is a question of law, not of fact; the court, therefore, not the jury, are its arbiters. Cowp. 752. — 2. A trader may be insolvent without being a bankrupt, and *vice versâ*. Dougl. 92 n.

(a) An act of bankruptcy partakes of the nature of crime. See the four first statutes. Cowp. 598. 1 Blk. 441. 4 Burr. 2256. Cooke, 122. 2 Blk. Com. 471. 5 Camp. 350.

(b) 1. A person who deals *in auter droit*, is or is not liable to be a bankrupt upon account of such dealings, according as the dealings are occasional or permanent. 1 Atk. 101. 10 Ves. 120. 1 Mont. 15 n. Cullen, 22. — 2. The executor of a trader buying the same articles as the testator dealt in, and selling them *entire*, may become a bankrupt. 1 Atk. 102. — 3. So likewise an executor trading merely for the benefit of the testator's children. Cooke, 75. 5 Esp. 88. Vide 10 Ves. 110. — 4. So an executor continuing the testator's trade with the residue, pursuant to the will, may, *comme sensible*, become bankrupt, though his name does not appear. Ibid. Cooke, 67. — 5. So a person carrying on business for the benefit of the brother and sisters of his wife, may be a bankrupt on account of such dealings. 5 Esp. 88.

(c) See *vide infra*.

(d) 1. The publisher of a newspaper, buying the whole daily impression from the proprietors, re-selling it at a profit, and bearing the loss of such as remain unsold, may be a bankrupt. 2 Mars. 256. 6 Taunt. 552. — 2. Drawing and re-drawing bills may or not be a trading, according to circumstances. 1 Atk. 128. Cowp. 751. 1 Atk. 205. — 3. The being entrusted with other men's monies, and drawing and re-drawing bills of exchange, for the sake of profit, is a trading. 1 Atk. 129. Cowp. 751. Vide 15 Ves. 556. 2 Mont. n. l. — 4. And it seems to have been considered, that borrowing money abroad, for the purpose of repaying it in England, at a certain rate of exchange, and repaying it by bills upon bankers in London, to whom foreign bills are remitted to make the payment, is a trading. 5 T. R. 530.

(e) 1. Manufacturers of every description, who purchase commodities and manufacture them into articles for sale, may become bankrupt; such as bakers, brewers, clothiers, coachmakers, dyers, glovers, goldsmiths, hosiers, locksmiths, milliners, nailors, plumbers, shoemakers, smiths, tailors, watchmakers, &c. Ld. Rd. 610. 741. 1480. Stone, 120. Hutt. 46. 2 Blk. Com. 476. Cro. Car. 51. Good. 12. 3 Mod. 530. Bea. Lex Mcr. 488. 529. 2 Wils. 169. 1 Christ. 48. 1 Atk. 141. 205. Cowp. 814. 4 Burr. 2148. 3 Mod. 350. Cro. Jac. 585. 2 Sch. & Lef. 414. 1 Rol. Abr. 60. pl. 11. — 2. So likewise a ship carpenter. Ld. Rd. 741. — 3. Though upon this last case, Mr. Christian remarks, that the report is imperfect in not distinguishing whether the party was a labourer or principal; and if a principal, whether attached as officer to a particular ship, to which also his dealings were restricted; since, if a labourer, or if such officer, and so restricted, he could be no trader. 1 Christ. 48. — 4. So likewise a land carpenter. 3 Mod. 155. — 5. So may a butcher. 4 Burr. 2148. — 6. So the lessee of land for the purpose of carrying on a public trade with its produce;

As a shoemaker. R. Cro. Car. 31. Cro. El. 268. Skin. 292.

An ironmonger, locksmith.

A salesman.

A clothier who buys wool, and converts it to cloths.

A tanner and baker. 3 Mod. 330.

Though he has left off his trade (*f*) for some time, if he absconds, &c. for debts contracted during (*g*) his trade. Adm. 1 Sid. 411. Semb.^o 1 Lev. 17. R. Pal. 325. (*h*)

Or for debts contracted in his trade, though newly secured after his leaving off his trade. (*i*)

Or if he leaves off his trade, but puts his stock into the hands of another with whom he is partner in gain and loss. R. Pal. 325. (*k*)

Or

produce; thus the lessee of a brick-ground, who makes bricks with the soil for public sale, has been held to be a trader. 1 T. R. 34. 1 B. C. C. 178. n. Cooke, 51. 53.; but judgment, *comme semble*, reversed. 1 Christ. 575. — 7. And Mr. Montague says, that whether a man who makes bricks for sale, upon land demised to him for a term of years, and sells them, be a trader, seems to be unsettled. 1 Mont. 10., referring to 1 T. R. 34. Cooke, 52. 2 Wils. 172. 7 East, 446. — 8. Mr. Christian remarks, that the judgment above quoted being reversed, there seems to be no case to prevent the universal adoption of the general principle established by 7 East, 442. which seems to be this: If a land-owner manufactures the produce of his own estate, and sells it under any shape or form, without the addition and accretion of any other material substance purchased, he is not a trader. 1 Christ. 575. Et vide 2 Rose, 426. — 9. Mr. Montague observes farther, that what dealing by the holder of an estate in its manufactured produce, that is, in its immediate produce, mixed with other purchased ingredients, in order to render such produce marketable, constitutes a trading, seems not to be finally settled. 1 Mont. 9. Vide 2 Mont. n. G. — 10. It has been held, that a brick-maker, taking the earth of the waste, for which he afterwards paid a consideration, and selling the bricks, is a trader. 1 B. C. C. 173. Vide 1 T. R. 34. Cooke 52. 7 East, 442. — 11. So likewise the owner of a coal-mine, vending the coal with other coal bought by him, at market. 2 Wils. 169. Vide 2 Rose, 424. — 12. And if a person attend public auctions of standing timber, and at different times purchase three parcels, and cut some of the timber, and strip and sell the bark of one parcel, and the tops and a part of the timber, and a small part for laths, this is a trading. 2 Taunt. 178.

(*f*) 1. An abandonment of the act, without an abandonment of the intent to trade, does not terminate the trading. 2 Rose, 357. 1 Rose, 403. 15 Ves. 449. 495. — 2. For the continuance of a trading, once established to have existed, is to be presumed. 3 Camp. 233. — 3. And whether there was an intention to abandon trade, is a question of fact for the jury. 1 Rose, 403. — 4. The mere circumstance too of a person's not having any transactions in business during a particular period, will not exempt him from the bankrupt laws, where by soliciting orders, &c. he evinces his intention of continuing trade. 5 Esp. 235.

(*g*) 1. The debt need not have been contracted, provided it existed, during the trading. Palm. 325. 1 Vent. 5. 1 Ld. Rd. 286. 2 Str. 1211. 3 Wils. 13. 3 Wils. 262. Dougl. 295. Cowp. 540. 1 Mont. 26 n. — 2. But payments, after retiring from trade, made upon a general account, must, notwithstanding a continuance of the dealing by the creditor, be applied to the old debt. Ld. Rd. 286. Comb. 468. Peake, 64. — 3. And the debt must have accrued before the party ceased to be a trader. Peake, 64. 12 Mod. 157. Ld. Rd. 286, 287. Comb. 463. 1 Mont. 26.

(*h*) An act of bankruptcy may be committed after retiring from trade. 15 Ves. 449. 495.

(*i*) Peake, 64. Hardw. 267. 2 Str. 1042. Vide 1 H. B. 462. 2 M. & S. 123. 2 Rose, 4. 1 V. & B. 212.

(*k*) 1. A *dormant partner* need not be included in a commission against the firm. 5 Ves. 424. 17 Ves. 403. 6 Ves. 434. Cooke, 9. Sed vide 3 V. & B. 126. — 2. And where a dormant partner shares only in profits, without interest in the property, he cannot be included. — 3. If three are in partnership together, and two reside at a distance from the place of trade, the shutting up of the house of trade by the managing

Or if he has effects of his trade in his hands, and upon credit of them contracts debts, though he does not buy more goods. R. 1 Vent. 166. (l)

So, a feme covert merchant may be a bankrupt. (m)

* By the st. (n) 21 Jac. 19. an alien or denizen may be a bankrupt as well as a subject. (o)

managing partner makes himself only, and not the other two, bankrupt. 2 M. & S. 556. — 4. The partnership is severed by a commission against one. 5 Ves. 295. — 5. Hence a separate commission against one of two partners was established, though the other died before the assignment. Ibid.

(l) 1. A party, though in one character exempt, yet from his mode of dealing assuming another, may in this last become a bankrupt. 1 Str. 513. — 2. Hence a farmer, from the extent of his dealings, becoming a horse-dealer, though unlicensed, may as such become bankrupt. 2 Rose, 58. 1 T. R. 573. — 3. So may a farmer, if he buy horses not calculated for the purposes of his farm, and sell them, and declare his intention to become a horse-dealer, and to take out a licence, and hire a person as his horse-dealing man. 1 Price, 20. — 4. So may an innkeeper who sells liquor indifferently to any person applying for it and not as a matter of favour. 1 T. R. 572. Lofft, 114. 3 Wils. 146. — 5. So may a victualler, by selling out of his house by retail, to any one applying. Cooke, 45. Rose, 84. — 6. So may one who keeps and kills more pigs than are required for his own consumption, with the view of profit from a re-sale. 1 Holt's C. N. P. 221. Vide 2 N. R. 79. — 7. So one who, living by catching and selling fish, is in the habit of buying and selling fish at sea, to make up, and assist others in making up, a sufficient cargo for the London market; and he once purchase fish in Holland, and sell in England. 5 Camp. 233. Vide 2 Rose, 427, 428.

(m) 1. That is, a *feme covert* sole trader by the custom of London. 1 Atk. 206. 3 Burr. 1776. 1 Blk. 570. Stone, 7. 52. 59. 66. 164. Billing, 89. Good, 16. 90. Vide 2 B. & P. 106. — 2. So a *feme covert* generally, where the coverture is suspended; as by the husband's abjuring the realm. 2 Hen. 4. 7. a. 1 Hen. 4. 1. a. 2 Blk. 1197. 1 T. R. 7. — 3. Being banished. Co. Litt. 152, 153. — 4. Or transported for his crimes. 2 Blk. 1197. Cooke, 43. — 5. And even perhaps where he is in alliance with enemies to our state. Vide Ld. Rd. 147. 1 Salk. 116. — 6. Is a felon. — 7. Or an outlaw. — 8. But under no other circumstances, is the relation of marriage suspended between a British subject and his wife; not therefore where he has deserted her and gone abroad. 11 East, 301. — 9. Where he has abandoned her for adultery. 8 T. R. 547. Vide 1 B. & P. 338. — 10. Where she lives apart from him, with a separate maintenance secured by deed. 8 T. R. 545. Vide Green, 91. — 11. Nor where she has represented herself as a single woman. 4 Camp. 26. — 12. Nor, as it seems, can the wife of a foreigner, resident abroad, be reckoned a *feme sole*. 3 Camp. 123. over-ruling 2 Esp. 554. 587, and, though not *in terms*, 1 B. & P. 557.

(n) 1. In addition to those in the text, the following occupations are *by statute* specifically made liable to the bankrupt laws. — *a banker*. 5 G. 2. c. 30. s. 39. — 2. And a person is such who receives money as a banker, although his books are kept in a different manner from that in which banker's books are usually kept; and although, upon his receiving any large sum, he pay it to his own established banker, upon whom he gives drafts for the payment of large bills upon him, he only keeping cash to answer small drafts. 1 Atk. 218. 129. — 3. And though he does not keep an open shop. 1 Atk. 218. — 4. But an agent to a regiment is not a banker. 1 Mont. 12. — 5. So a *broker* is made liable by 5 G. 2. c. 30. s. 39. — 6. And it seems that a pawnbroker is a broker within the act. 1 Atk. 206. — 7. And in like manner a salesman of cattle. 1 Christ. 579. — 8. So a *factor* is made liable by st. 5 G. 2. c. 30. s. 39. — 9. But *quære*, if a cattle factor be a factor within the act. Willes, 189.

(o) 1. These *individuals* are liable to the bankrupt laws: a clergyman. Cowp. 745. 1 Atk. 197. — 2. An illegal trader. 1 Atk. 196. 4 Burr. 2066. — 3. A lunatic, upon an act of bankruptcy when sane. 13 Ves. 590. — 4. A member of parliament. 1 Atk. 197. 200. Hughes' Abr. 315. 4 G. 3. c. 33. — 5. A foreign minister's servant. 7 Ann. c. 12. s. 5.

So by the st. 21 Jac. 19. (*p*) a scrivener receiving others money or estates into his trust or custody. (*q*)

So a subject who travels, and in a foreign realm trades hither. R. 1 Sal. 110. (*r*)

So a man who trades in Ireland and sometimes in England. 2 Ves. 162.

Qu. If only beyond sea? 2 Ver. 162.

(B) Who not.

But a man (*s*) cannot be a bankrupt by buying and selling, if his principal means of living be not gained by it; and, therefore, a farmer, though he buys beasts, &c. and afterwards sells them, cannot be a bankrupt; for his principal means of living (*t*) is by his labour (*u*), and not by

(*p*) Not repealed by 10 Ann. c. 15. 1 Atk. 141.

(*q*) 1. A *scrivener*, it seems, is a person that in the ordinary course of his dealing is entrusted with other men's property, to lend it for his employer. 21 Jac. 1. c. 15. s. 2. 1 Atk. 218. 2 Sch. & Lef. 421. 5 Camp. 540. — 2. It has been ruled at nisi prius, that he is one who carries on the business of a scrivener *eo nomine*. 1 Esp. N. P. C. 555. — 3. He must seek to gain his living by his dealing. 1 Rose, 405. — 4. But he need not keep an open shop. 1 Atk. 218. — 5. He must be entrusted with other men's property. 2 Mont. n. L. 1 Christ. 58. — 6. And a mere receipt of money and using it does not constitute a scrivener; as steward or receiver of landed property. 1 Esp. C. 555. — 7. Nor the borrowing money upon one's own, or upon borrowed accommodation bills, and paying the discount for them. Cowp. 347. — 8. Nor does the frequently taking, by a clerk of the custom-houses, debentures for merchants, receiving the money for them, which he keeps in his possession, and receiving commission with the receipt of the money, and then with the money so received, discounting bills or notes for his own benefit. 1 Esp. 555. — 9. When an attorney is entrusted with other men's monies to lend upon security, and such trust is *incidental* to his occupation of attorney, it seems that he is not liable to the bankrupt laws, from his seeking to gain a living by transacting such loans; but if such trust, and seeking to gain a living is distinct from his occupation of an attorney, he is a trader. 1 Mont. 18. 2 Mont. n. N. 2 Esp. 555. 5 Camp. 554. 1 Holt, N. P. C. 507. Id. 654. Et vide 2 Rose, 27. 2 V. & B. 31. 175. 2 Sch. & Lef. 414.

(*r*) Any one, whether native, denizen, or alien, trading in or to England, though visiting here only upon occasions, or even residing entirely abroad, may, by committing an act of bankruptcy here, become a bankrupt. St. 15 Eliz. c. 7. s. 1. 1 Jac. 1. c. 15. s. 2. 21 Jac. 1. c. 19. s. 15. T. Raym. 375. 2 Jones, 141, 142. Salk. 110. 2 Vern. 162. Cowp. 598. 5 T. R. 550. 1 Taunt. 270.

(*s*) 1. These *individuals* are not liable to the bankrupt laws: a lunatic upon an act of bankruptcy during insanity. 6 Ves. 440. — 2. A feme covert upon a trading when single. 2 B. C. C. 266. Cooke, 35. — 3. Still less upon a trading during marriage, unless she be a sole trader in London, or her husband was then *civiliter mortuus*. Vide supra. — 4. An infant, or an adult, upon a trading during infancy. Cro. Jac. 454. Ld. Rd. 443. B. N. P. 58. 154. 1 Atk. 146. Sel. Ca. Ch. 46. 4 Ves. 163. 6 Ves. 601. 14 Ves. 602. 1 V. & B. 494. — 5. *Quære*, Whether one attainted can be made a bankrupt. 14 Ves. 452.

(*t*) 1. It seems, that no occasional dealings, without any intent to continue them, will make a man liable to bankruptcy. 6 Ves. 3. Cowp. 745. 2 Blk. Com. 476. 1 Vent. 270. 4 East, 346. — 2. But such dealings, with such intent, will. 1 T. R. 573. n. 1 T. R. 572. 6 Ves. 3. 4 Ves. 168. — 3. For where an *intention* to deal *generally* is established, the *extent* of the trading is immaterial. 1 T. R. 572. Id. 573. n. 2 Taunt. 176. 1 Price, 20. 14 Ves. 603. 1 V. & B. 211. 1 Rose, 84. — 4. Which intention may, aided by circumstances, be inferred from a single instance of buying and selling. Ibid. 1 Holt, N. P. C. 221.; et vide 1 T. R. 573. n. 1 T. R. 572. 6 Ves. 3. 1 B. C. C. 173. — 5. Though the contrary seems to have been held formerly. 2 Blk. Com. 476. 2 Keb. 487. 3 Keb. 451. 1 Vent. 29. 270. 2 Taunt. 176. 4 East, 346.

(*u*) In every case (save those excepted by statute), where a man buys materials and sells

by his buying and selling. Cro. Car. 549. By the st. (x) 5 Ann. 22. Per Holt, 1 Sal. 110. Per two J. 2 Mod. Ca. 48. (y)

Nor a husbandman or labourer. Cro. Car. 31. (z)

Nor an innholder. R. per three J. Berkly cont. Cro. Car. 549. R. 3 Mod. 329. 3 Lev. 309. Jon. 437. Carth. 150. 1 Sal. 109. Skin. 291. Sho. 96. 269. (a)

Nor the master of a boarding-school. 3 Mod. 330. (b)

Nor a gun-founder; for he works for the service of the army. Skin. 292.

Nor by the st. 5 Ann. 22. a grazier or drover. Cont. before. Jon. 304.

So a man, who lives by buying only and not selling, cannot be a bankrupt.

Or by selling only. (c)

So,

sells them again, without charging for his labour as a servant, he will be a trader, and may be a bankrupt; but if he charges for his labour according to the time he is employed, and only sells what he buys to the masters who employ him, he cannot, it should seem, be considered as a general trader. 1 Christ. 48, 49.

(x) The following occupations are, by statute, specifically exempted from the operation of the bankrupt laws:—No farmer, grazier, or drover of cattle, shall be deemed a bankrupt. 5 G. 2. c. 30. s. 40. — 2. A cowkeeper, whose dealings are incidental to either of these three occupations, is within the exemption. 1 Swanst. 64. — 3. And cowkeeping, by grazing the cows and selling the milk, seems not to be a trading. 1 Mont. 6. — 4. A farmer, who occasionally buys hay, corn, horses, and pigs connected with his occupation as such, is within the exemption. 2 N. R. 78. — 5. So, likewise, a farmer buying seeds to resell mixed with his own growth, and buying pigs to feed upon his stubbles and resell. 7 Taunt. 409. — 6. A farmer is not a trader by making and selling the cheese on his own farm, or by making his own apples into cyder, and selling it. 1 Mont. 9. Cooke, 60. — 7. It seems to be decided, that any buyer and seller of cow calves, or horned cattle, is a drover, and cannot be a bankrupt. Willes, 588. B. N. P. 39. 11 East, 274. 1 Christ. 578. — 8. To buy and sell sheep constitutes, it seems, part of the business of a drover; but dealing in pigs seems to be a distinct trade. 1 Christ. 578. — 9. Being a receiver-general of taxes is not a trading. 5 G. 2. c. 30. — 10. Nor is the circulating of exchequer bills. See the several acts relating to exchequer bills.

(y) 1. March, 34; see Good. 13. 2 Wils. 169. 1 T. R. 34. Cooke, 47. 53. — 2. But graziers and drovers had, previous to the statute, been held liable. Cro. Car. 549. Good. 15. 212.

(z) 1. Cooke, 47. 53. — 2. It seems, a bleacher cannot be made a bankrupt. 1 Christ. 46. 1 Mont. 17.; but Cooke, 43, contra; see 2 Mont. n. M. — 3. Nor a calenderer. 1 Christ. 46. — 4. Nor a dyer. Ibid. as in pl. 2. — 5. Nor a scavenger. 1 Rose, 373. 1 V. & B. 247, vide 2 Mont. n. E.

(a) 1. 4 Burr. 2064. 2 Wils. 382. Cooke, 47. 53. Ld. Rd. 286; vide 1 Christ. 50. — 2. Nor a victualler. Ibid.

(b) 1. A schoolmaster who buys books and clothing, and retails them to his scholars at an advanced price, is not a trader. Peake, 76 — 2. Nor a schoolmaster who buys and dresses provisions for his boarders. 3 Mod. 327. 1 Show. 96. 268. 3 Lev. 309. Carth. 149. Salk. 109. 3 Keb. 451. Vide 4 M. & S. 98. — 3. But where the dealings of a dissenting minister and schoolmaster were, selling school books to his scholars, and books of prayers and hymns for the use of the meeting-house to the members of his congregation; doubts were entertained whether this was not a trading. 1 Mont. 7. — 4. The buying fish occasionally by a fisherman to make up his stock for market, is not a trading. 2 Rose, 424. — 5. Nor is the buying articles by the owner of a colliery, and selling them to his pitmen. 2 Rose, 424. Cooke, 58.

(c) 1. Unless where particular employments are specified by statute, there must, it seems, be both a buying and selling to make a bankrupt. 1 T. R. 34. Cooke, 52. 7 East, 442. 3 Smith, 445. 2 Sch. & Lef. 426. — 2. Not a buying only, or a selling only, but a buying and selling. 3 Keb. 451. Cowp. 745. Blk. Com. 476. — 3. And not a buy-

So, if a man has a particular employment (*d*), in which he buys and sells, he cannot be a bankrupt, unless it be a general trade; as, if a man purchase and sell lands. (*e*)

If he victuals the navy. R. 1 Vent. 270. D. 1 Sal. 110. (*f*)

If he be a butler, steward to the king, inns of court, &c. Skin. 292. (*g*)

A farmer of the customs, excise, &c. or by the st. 5 Ann. 22. the receiver-general of the taxes.

Though he buys several things by this means, and sells the surplus (*h*), or part of them again. 1 Vent. 270.

So a trader cannot be a bankrupt for debts contracted after he has left off his trade. R. 1 Sid. 411.

Though he afterwards becomes a trader again. 1 Sid. 411. 1 Lev. 17.

Though after leaving off his trade, he sells his old stock. R. 1 Sid. 411. 1 Vent. 29. (*i*)

By the st. 14 Car. 2. 24. none shall be a bankrupt for his stock in the East-India or Guinea company or fishing trade, or for selling his dividend received therein in goods, &c.

And by the st. 9 & 10 W. 3. 44. no member (*k*) of the East-India company (*l*), in respect of his stock therein only.

So, if a man has a part in a ship, it does not make him a bankrupt, unless he freights it. 1 Sid. 411. 1 Vent. 29. (*m*)

Or

ng and selling merely, but a buying and selling to gain a livelihood. 1 T. R. 34. Cooke, 52. — 4. The thing bought, too, must be purchased as in itself an article for trade, and not as an accessory to the produce of land, where such produce is intended to be sold in its natural shape. 1 T. R. 34. Cooke, 52. — 5. Secus where the produce itself is only the raw material of a manufacture, and used as such. 1 T. R. 34. Cooke, 52.

(*d*) Where a person's income arises partly from buying and selling in the way of merchandize, and partly from buying and selling not in the way of merchandize, it seems that he is liable to the bankrupt laws, if the buying and selling in the way of merchandize, is collateral to the dealing not in the way of merchandize; but that he is not liable, if such buying and selling is only incident thereto. 1 Mont. 17.

(*e*) 2 Wils. 169. 5 Esp. 147.

(*f*) 5 Kcb. 451.

(*g*) 5 Kcb. 451.

(*h*) If a person, finding that he has bought more of an article than he wants, sells the residue, it will not make him a trader. 11 East, 276.

(*i*) 1. 1 Vent. 169. 1 Atk. 102. — 2. Nor is the executor of a trader, by disposing of the testator's stock, made liable to become a bankrupt. 1 Atk. 102. — 3. Even though it is necessary for him to purchase ingredients to make that stock marketable. Cooke, 44; vide 1 Atk. 102.

(*k*) The trading which arises from being a member of a corporate trading company, seems not in any case to be a trading within the bankrupt laws. 2 Mont. n. D.

(*l*) 1. Or Bank of England, st. 8 & 9 W. 3. c. 20. 5 G. 1. c. 8. s. 43. — 2. Or London Assurance, or Royal Exchange Assurance. 6 G. 1. c. 18. s. 6. — 3. Or South Sea Company, 9 Ann. c. 21. s. 42. 8 G. 1. c. 21. s. 12. — 4. Or English Linen Company. 4 G. 3. c. 37. s. 13. Vide 15 Ves. 357. — 5. Or seemle a shareholder in the Stationer's Company. Ld. Rd. 851. Cooke, 69.

(*m*) 1. Nor is dealing in hackney coaches, or letting out horses to hire, a trading. 3 Mod. 327. 4 Ves. 168. — 2. Nor buying and selling stock on one's own account, 2 P. Wms. 308. 2 Blk. Com. 476. Cullen 17. 1 Mont. 8. — 3. Nor is an underwriter a trader. 15 Ves. 355. — 4. Neither the owner nor farmer of an interest in land, by buying and selling the same, or the immediate produce or profits thereof, can be made a bankrupt. 2 Wils. 169. Loft 323. Cooke, 47. 53. 61. Vide 7 East, 447. — 5. Hence, making bricks from the produce of one's soil, whether termor or freeholder, is not a trading. 2 Rose, 424. — 6. And where a brickmaker in a large way became by

Or if he freights it, when he does not get so much as is due upon the bottom for repairs. R. 1 Sid. 411. 1 Vent. 29.

If a man commits an act of bankruptcy, and afterwards pays, or compounds with all his creditors, he will be a new man. R. 1 Sal. 110.

(C) Act of bankruptcy. (n)

(C 1.) What shall be. — Concealment of himself.

By the st. 13 El. 7. and 1 Jac. 15. if any, &c. depart the realm (o) of intent to defraud his creditors, being subjects, or for the same intent begin

by devise tenant for life of the land whereon the kiln was worked, and of the soil whereof the bricks were made, he was held to be no trader. 7 East, 442. 5 Smith, 445. — 7. If a person sells stones from a quarry upon his own estate, it is not a trading. 1 V. & B. 45. — 8. Nor is the working as a lime-burner of a lime-kiln upon one's own farm. 1 Rose, 316. 1 V. & B. 360. — 9. Nor the making and selling of allum upon his estate by the lessee of allum works. Cooke, 46. 60. Vide 7 East, 447. — 10. Nor the buying a coal-mine, working it, and selling the coals. 2 Wils. 169. — 11. A person who buys timber, which he works into houses that he builds and sells, is not a trader. 5 Esp. 147. — 12. Nor a person who builds a theatre to be held in shares, for which he is to be paid according to measure and value, he being himself a shareholder. 1 Cowp. 300. — 13. Nor one who erects public baths upon land granted for this purpose, to himself and another as joint tenants. Ibid. — 14. It has been said, that a building upon a man's own land, for any purpose, is not a trading. 2 Camp. 300.

(n) 1. As to the legal effect of an act of bankruptcy apart from a commission: — the party may sue for a debt. — 2. Nor does an act of bankruptcy by the vendee, between the sale and delivery, rescind the contract. 5 T. R. 231. 3 Ves. 255. — 3. A trader had committed an act of bankruptcy; goods were afterwards sent by a vendor to a particular inn as ordered, whence they were forwarded to a packer's, pursuant to a general order of the trader, to send all goods directed to him there; the packer, ignorant of the act of bankruptcy, booked them to his account, and opened them to ascertain what they were: The assignees were held entitled. 5 B. & P. 469.

(o) 1. The mere departure from the realm, or dwelling-house, keeping house or absentsing himself, and the consequential delay of a creditor, will not constitute an act of bankruptcy, without proof or necessary inference of an intention to delay, at departing. 7 T. R. 509. 1 Taunt. 270. Id. 273. 2 Ves. & Beam. 177. 1 Rose, 387. — 2. The fear of arrest concurring with other motives to induce a departure; such departure is an act of bankruptcy. Holt, 175. — 3. That a departure from the realm or dwelling-house, keeping house, or otherwise absentsing himself, may be an act of bankruptcy, delay of creditors need not concur with the intention to delay. 9 East, 487. 1 M. & S. 676. 1 Taunt. 270. Id. 273. 1 Mont. 48, n. (b). Ibid. 14 Ves. 86. Though formerly it used to be considered essential. 7 T. R. 509. 8 T. R. 166. — 4. Where the delaying of creditor is the necessary consequence of the trader's absentsing himself, the departure constitutes an act of bankruptcy. 1 Camp. 279. Vide B. N. P. 39. — 5. If a trader depart the realm to avoid a criminal prosecution; or in defiance of such rules of morality, as to manifest a neglect of the interest of his creditors, he commits an act of bankruptcy. 2 Mont. note 2 C. 1 Camp. 279. — 6. If a trader, when pressed for debts, depart the realm, it is presumptive evidence of an intent to delay his creditors. 1 Camp. 279. — 7. If a trader, whose residence is in Dublin, quit England to avoid being arrested, and return home, he commits an act of bankruptcy. 2 Taunt. 126. — 8. A trader resident abroad, having come to England for a temporary purpose, commits an act of bankruptcy, by leaving it to avoid a creditor. 1 Taunt. 270. 1 Camp. 152. Id. 80. c. — 9. If a trader depart with an honest intention, compatible with business, he does not commit an act of bankruptcy. 1 Holt, 176. — 10. Attention, previous to his departure, to the interests of his creditors during his absence, is admissible evidence to disprove bankruptcy by departing the realm. 1 Camp. 279. — 11. If, previous to a trader's departure from the realm, he advertise in the public papers that he is going, and that the ship will clear for sea within the month, and that he will take charge of any shipments; the presumptions are, that the departure is not to delay. 2 Ves. & Beam. 177. — 12. If a trader, having a house of trade

begin to keep his house (*p*), or otherwise absent himself (*q*), or depart from

trade in England and in Ireland, depart from England to Ireland, without leaving funds for the payment of his debts, it is not to be presumed that he commits an act of bankruptcy. 1 Stark. 144. — 13. If when a trader quits the realm he leave a partner in England, the presumption that he meant to delay his creditors may be removed. 1 Camp. 279. — 14. A trader going to France to look after his concerns there, does not commit an act of bankruptcy, though his creditors be thereby delayed. Holt, 175: 5 Ves. 576.

(*p*) 1. Vide supra. — 2. If a trader not having any house of his own, keep in another man's house; or not having any house keep in his chambers; or if he keep on ship-board; or if a miller keep within his mill; or a churchwarden within the church; or a keeper of the king's castle within the castle; it seems it is an act of bankruptcy. Stone, 9. Vide 2 Mars. 236. 6 Taunt. 532. 1 M. & S. 676. 2 T. R. 62. — 3. Circumstances amounting to an act of bankruptcy, by keeping house; viz. not going to his counting-house, nor into the town near which he lived; sending for his papers to his house; not going out, except taking an evening walk in the country. 16 Ves. 149. — 4. If a trader keep at home, to avoid the consequences of a former arrest, he commits an act of bankruptcy. Burnes, 160. — 5. An order to be denied is not sufficient without an actual denial. Cooke, 74. — 6. The intention of the creditor in calling is immaterial. 3 Ves. & Beam. 129. 2 Rose, 67. — 7. It is not necessary that the order to be denied should be confined to a particular creditor; a general order of denial, followed by actual denial, is sufficient. Cooke, 94. — 8. A general order of denial, followed by an actual denial, is an act of bankruptcy, though it appear that the debtor would not have denied himself to the individual creditor, had he known that it was him. 1 Taunt. 479. — 9. A denial to be seen by a creditor, without a denial of being at home, may be an act of bankruptcy. Cited 9 East, 491. — 10. A denial when the trader is at home, is sufficient, though he is seen by the creditor. 15 Ves. 451. — 11. The denial need not be to the creditor personally, though formerly it was held otherwise. B. N. P. 39. Green, 45. — 12. Denial to a creditor's clerk is sufficient. Cooke, 83. — 13. Denial to a maid-servant, who went by appointment of the debtor, upon the preceding evening, is an act of bankruptcy. 15 Ves. 449. — 14. A denial, to avoid process out of chancery under a decree for a debt, will be an act of bankruptcy. Supra. — 15. A trader withdraws from his counting-house to his parlour, for the purpose of avoiding the importunities of his creditors. This is an act of bankruptcy. 1 Camp. 271. — 16. A denial to several persons, whom the witness believes, from their frequent calling, to be creditors, is evidence to go to the jury. 1 Esp. 381. — 17. A denial to a creditor who calls for payment, but does not ask to see the debtor, is not an act of bankruptcy. 1 Camp. 271. — 18. If a trader come out to a creditor and say that he is not at home; this, *comme semble*, is not an act of bankruptcy. 15 Ves. 451. — 19. The denial must be to a creditor who has a debt at that time due. A denial therefore to one, having a note payable at a future day, will not, by itself, be an act of bankruptcy. 7 Vin. 6. pl. 14. — 20. A denial is always open to explanation; as in cases of sickness, company, particular business, or the lateness of the hour; for the mere denial is not *conclusive* evidence of an intent to delay. 1 Atk. 201. 1 Burr. 484. B. N. P. 38. — 21. A refusal to see a creditor, merely upon the ground of his calling at the trader's dinner hour, is not an act of bankruptcy. 3 Camp. 549. B. N. P. 39. — 22. A direction to a servant to deny the trader to any one who should come whilst he is at dinner, or engaged in business, is not an act of bankruptcy. Holt, 159. — 23. It is not an act of bankruptcy for a debtor to cause himself to be denied to a creditor calling, by the debtor's appointment, for payment on a Sunday. 2 Rose, 21. 2 Ves. & Beam. 311. — 24. A denial to avoid an attachment for non-delivery of goods, will not be an act of bankruptcy, as it is only to evade doing a duty. 1 Atk. 196. *Quare*, as the stat. of Eliz. has the words "debt or duty." 1 Mont. 49. n. (f.) — 25. Unless a denial to a creditor is in consequence of a direction from the debtor, a subsequent approbation of it by him, will not make it an act of bankruptcy. 1 Rose, 50. 17 Ves. 416.

(*q*) 1. Supra. — 2. The act of absenting is presumptive evidence of an intent to delay. Green, 52; see the note in 3 Camp. 530. — 3. It seems that any evasion by a trader of his creditors, is an absenting. 2 Mars. 236. — 4. The words "or otherwise to absent himself," in stat. 13 Eliz. c. 7. & 1 Jac. 1. c. 15. are not confined to an absenting from the dwelling-house, or any particular place. 2 Mars. 236. 6 Taunt. 532. — 5. A trader who is in the habit of attending the Royal Exchange, and who retires

from his dwelling-house (r), or take sanctuary, whereby a creditor, being a subject, may be defeated or delayed of his just debt, he shall be adjudged a bankrupt.

And

tires from Change upon the approach of a creditor, and desires a friend to tell him that he is not there, commits an act of bankruptcy by absenting himself. 2 Mars. 236. 6 Taunt. 532. — 6. A trader having a counting-house in town, and a dwelling-house in the country, left the former (to which he never returned), taking his books with him, and slept at his dwelling-house a few nights, when he finally left that also. Held, that having quitted his counting-house without the *animus revertendi*, he began to absent himself from that day, within the stat. of Eliz., and thereby committed an act of bankruptcy. 1 N. R. 234. — 7. A. in London, is in partnership with B. in Manchester. A. goes to Manchester, and after remaining there two days, secretly leaves the Manchester counting-house with B. This is an act of bankruptcy by both. 5 Camp. 312. — 8. It seems that a trader absents himself within the meaning of the bankrupt laws, who disappears after sojourning sometimes at one place, sometimes at another, in consequence of not having any house of his own. Billing. 92. — 9. A trader went into a back shop in a neighbour's house to avoid being seen by an officer, who he said he was afraid had a writ against him. This is an act of bankruptcy. 1 M. & S. 676. — 10. A trader, upon being applied to for payment, leaves his house under pretence of getting money, but goes to a billiard table and remains there the whole evening. This is an act of bankruptcy. 2 Esp. 651. — 11. A trader remaining abroad, with intent to delay his creditors, commits an act of bankruptcy. 1 Stark. 147. 4 Camp. 289. Sed vide supra. — 12. If a trader absent himself to get the term of a creditor, he commits an act of bankruptcy. 2 Str. 809. — 13. Absenting himself to avoid process for the payment of money, is an act of bankruptcy. 2 Str. 809. Barnes, 160. Billingham, 92. Stone, 10. 1 Atk. 240. 1 Atk. 196. — 14. If a trader, upon absenting himself from his house, state that writs are out against him, it is not necessary to shew that any writ had in fact issued. 1 Esp. 354. S. C. Mont. — 15. A trader being arrested, escaped from the officer, and fled into the house of another person, where the door was kept fast, and the officer was not permitted to enter; and he continued there until it was dark, having declared, that though the debt was paid upon which he was arrested, yet he was afraid of being opposed by some other creditor. This is an act of bankruptcy by absenting himself. 1 M. & S. 358. — 16. A trader, by secretly withdrawing himself after having been arrested, absents himself within the meaning of the bankrupt laws. Green, 52. — 17. The absenting must be voluntary, and not by means of arrest. Green, 52; see the note in 5 Camp. 530. — 18. A trader's absenting himself for fear of being arrested by a writ *de excommunicato capiendo*, or to avoid an attachment under a decree in chancery for not making a conveyance, is not an act of bankruptcy. Billing. 92. — 19. Where the bankrupt being embarrassed, appointed a day for three of his principal creditors to come to his counting-house and examine his books, and early on that morning he left his house and went to a public-house in the neighbourhood, where he directed his clerk to bring him intelligence of what passed with his creditors, and assigned as a reason for so doing, that he expected that his creditors would be irritated, and that some harsh language might pass, and that possibly they might be induced to arrest him. Held, not an act of bankruptcy. 4 Taunt. 603.

(r) 1. Departure from the dwelling-house, or realm, and the consequential delay of a creditor, not an act of bankruptcy, without proof or necessary inference of an intention to delay at the instant of departure. 2 Ves. & Beam. 177. — 2. Pressure of debts, though strong, not conclusive evidence of that intention. 2 Ves. & Beam. 177. — 3. The motive must be inquired into, and though the inference, from mere departure, is against the trader, yet circumstances may explain it away. 7 T. R. 509, cited ibid. 1 Burr. 484. — 4. Act of bankruptcy by quitting the dwelling-house, with the intention of delaying a creditor, though under the impression of a groundless apprehension. 15 Ves. 449. — 5. The departure must be voluntary. Str. 809. — 6. A compulsory absence, as in the case of arrest, will not be an act of bankruptcy. Green, 53. — 7. The length of the absence is an immaterial circumstance. Str. 809. — 8. That a creditor should have called is not required for the act of bankruptcy by absconding, as for that of keeping house. As to the reason of that distinction, if the latter can be established by other evidence, *quare*. 14 Ves. 85. — 9. If a person is living at an inn or a public-house, where his business requires him to be resident for a time, and he departs from that house to delay creditors, it is an act of bankruptcy. 2 Taunt.

And if he has no constant dwelling, if he absents himself from his usual abode.

If a miller keep himself within his mill.

A churchwarden within the church.

And therefore, if a man absent himself from his house or abode for debt.

Or abscond within his house for a day or an hour, with design to defraud or delay his creditors. R. Pal. 325.

Or denies himself, when he knows that a creditor comes for his debt; he will be a bankrupt.

Or upon notice of process or execution against him for debt.

Or process out of chancery upon a decree for payment of a debt.

Though the concealment of himself be only for a little time. Pal. 325.

Or he be sued only as surety for another. Pal. 325.

Otherwise, if he absent himself, or abscond for other cause than to defraud or delay creditors: as, if it be to avoid an arrest upon an *excommunicato capiendo*.

Or to avoid the service of process to enforce a decree in chancery.

So, if he absconds sometimes for debt, but afterwards appears publicly and openly for the most part in his shop and upon the Exchange. Semb. Cro. El. 13.

So, if he absconds, and afterwards goes beyond sea and trades; for this is evidence, that his first concealment was not to avoid creditors. 1 Sal. 110.

Yet if he trades *de novo* after a manifest act of bankruptcy, this does not purge (s) his bankruptcy. 1 Sal. 110.

(C 2.) Fraudulent arrest, &c.

So by the st. 13 El. 7. and 1 Jac. 15. if any, &c. suffer himself willingly to be arrested for money not due for goods or other just cause, or

2 Taunt. 176. — 10. If a trader goes away without leaving any directions for carrying on his business, he commits an act of bankruptcy. 3 Camp. 530. 1 Mars. 128. — 11. A debtor admitting and seeing a creditor calling for payment, then pretending that he is going for the money, leaving the house with the creditor in it, commits an act of bankruptcy. Esp. 651. — 12. An absence to avoid an attachment for not performing an award for the delivery of goods, is not an act of bankruptcy; *secus*, if for payment of money. Atk. 196. — 13. Where a debtor, being embarrassed, appointed a day for three of his principal creditors to come to his counting-house, and examine his books, and early upon that morning he left his house, and went to a public-house in the neighbourhood, where he directed his clerk to bring him intelligence of what passed with his creditors; and assigned as a reason for so doing, that he expected that his creditors would be irritated, that some harsh language might pass, and that possibly they might be induced to arrest him; held, not an act of bankruptcy. 4 Taunt. 603. — 14. Act of bankruptcy, by leaving his house to avoid a creditor, without collusion, complete the instant of departure; and therefore not affected by subsequent residence with the petitioning creditor. 1 V. & B. 45.

(s) 1. If an act of bankruptcy be equivocal, circumstances may be called in to explain; but if clear and unequivocal, it cannot be purged or explained away by subsequent circumstances. Cro. Eliz. 13. 1 Salk. 110. 1 Burr. 467. 2 T. R. 59. Vide 2 Blk. Com. 485. 1 Taunt. 479. — 2. A denial, therefore, to a creditor is not purged by his being admitted in consequence of his importunity. 3 Esp. 245.

suffer

suffer himself to be arrested, or yield himself to prison (t), of intent to defraud or hinder creditors, he shall be adjudged a bankrupt.

So by the st. 1 Jac. 15. if any fraudulently procure himself to be arrested, or his goods, money, or chattels, to be attached or sequestered. (u)

And therefore, if he become a prisoner in the Fleet or Marshalsea, he will be a bankrupt.

So, if he cause a voluntary or feigned action to be commenced against him.

But he is not a bankrupt if his goods are attached, or sequestered without his procurement; as, upon an attachment out of a court for his default or laches.

So, if A. has a rectory impropriate, and the tithes are sequestered for not repairing the chancel.

(C 3.) Continuance in prison.

So by the st. 1 Jac. 15. if any arrested for debt, shall after the arrest lie in prison six months, (or by the st. 21 Jac. 19. two months,) or more, upon that or any other arrest or detention in prison for debt, he shall be adjudged a bankrupt.

Though the debt be of what value soever, for which he shall be arrested.

Though bail be given at first, and he lies in prison afterwards, but not immediately upon the arrest. Ray. 481. 1 Sal. 109.

But the arrest must be lawful; and therefore, if he be arrested by an executor before probate, it does not make him a bankrupt. R. 3 Lev. 58. 1 Vent. 370. (x)

(t) If a trader, who is arrested, have money sufficient to pay the debt, but go to prison to force his creditors to a composition, he commits an act of bankruptcy. 7 Vin. 61.

(u) Attachment and sequestration mean that sort of process by which suits are by custom commenced, as in the city of London; and do not relate to final process. Cooke, 112. Cowp. 327. Vide 2 East, 411.

(x) 1. That lying in prison for the specified time may be an act of bankruptcy, an intention to delay creditors need not concur. 9 East, 487. — 2. It seems, that a person does not commit an act of bankruptcy, who is committed in execution of a criminal sentence, and who, during the course of that commitment, is charged with a debt, and detained for upwards of two months, although after the expiration of the sentence. Goodinge, 26. Ves. 168. — 3. Nor, as it seems, does a party, by lying in prison for two months upon an arrest, upon a bond, before the day of payment, in order to oblige the debtor to find sureties, according to the custom of London. Billing, 96. Goodinge, 26.; vide Cooke, 109. — 4. Nor, as it seems, by lying in prison for two months upon an arrest, on a demand arising upon a contract, where the proper remedy is by bill for a specific performance. 1 Atk. 147. — 5. Whether the lying in prison upon an arrest by an executor before probate, is within the statute, seems to be doubtful. Freeman, 270. 1 Vent. 370.; vide 2 Lev. 57. — 6. A person is arrested by virtue of a warrant directed to a sheriff's officer, but upon account of illness is permitted to remain a few days in his own house, in the custody of the officer's follower, who is not named in the warrant, but who keeps the key of the house in his possession; he is then removed to gaol, where he continues for the remainder of two months. Held, that this is a legal imprisonment, so as to constitute an act of bankruptcy. 1 Mars. 469. 6 Taunt. 106. 4 Camp. 164. — 7. The time must be computed from the commencement of imprisonment. 1 Camp. 509. — 8. And since in computing time from an act, the day of doing it must be included, the day of the arrest must be reckoned part of the two months. 3 East, 407. — 9. A legal month is a lunar month, or twenty-eight days. 3 Atk. 546. 2 Blk. Com. 141. — 10. And a commission issued fifty-six days inclusively after the arrest, is good. 4 Esp. 221. 3 East, 407. — 11. If the

(C 4.) Fraudulent outlawry.

So by the st. 13 El. 7. and 1 Jac. 15. if any, &c. shall suffer himself to be outlawed.

But an outlawry in Ireland (*y*) does not make one a bankrupt. (*z*) .

Nor outlawry here, unless it be with intent to defraud creditors. Semb. 1 Lev. 13. (*a*)

Or if it be reversed before the commission issues. (*b*)

Or reversed for default of proclamations after the commission.

(C 5.) Non-payment, &c. after suit.

So by the st. 21 Jac. 9. if any, &c. being indebted to any person or persons in 100*l*. or more, shall not pay or compound for the same in six months after it shall grow due, and he be arrested for the same; or in six months after an original sued for the same debt, and notice of it given to him, or left in writing at his dwelling-house or last place of abode, he shall be a bankrupt.

Though he be arrested by process out of the exchequer, and the suit be not by original.

But by the st. 10 Ann. 15. this description of a bankrupt after 20 April, 1712, is void and repealed; provided no act, sale, or disposition of any bankrupt's estate upon the said description, by force of a commission before the said 20 April, shall be avoided.

the trader, after being arrested, find real bail, and afterwards surrender in discharge of his bail, and lie in prison two months, he is a bankrupt from the time of his surrender, and not from the time of the first arrest. 1 Vent. 370. 2 Show. 512. 1 Salk. 109. 1 Salk. 110. Willes, 464. 1 Burr. 437. — 12. But in the case of a mere formal bail, for the purpose of changing a prisoner from one custody to another, the trader is a bankrupt from the time of the first arrest. 1 Burr. 437. — 13. If, after an arrest, the trader is too ill to be immediately removed, and he remains some days in his house, and is then carried to prison, the relation is to the first arrest. 4 Camp. 164. — 14. A trader is arrested upon the fourth, and is allowed to be at large till the eighth, when he returns into custody; on the tenth he is removed by *habeas corpus* into K. B. and remains there two months; the bankruptcy has relation to the eighth. 1 Camp. 509. Vide 4 Taunt. 198. — 15. A trader who, being in prison at the suit of one plaintiff, is detained at the suit of another, commits an act of bankruptcy, if he lie in prison two months after such detainer, although, as to the first arrest, he is discharged within two months. 2 Burr. 814.

(*y*) 1. The act of bankruptcy must be committed in England. Dick. 533. 2 Vern. 156. 1 Salk. 110. Cowp. 398. 1 Atk. 82. 5 T. R. 530. — 2. Though evidence in proof of it may be drawn from matters done abroad. 1 Rose, 150. — 3. As a consequence of the first position, a fraudulent grant or conveyance, if executed abroad, is not an act of bankruptcy. 5 T. R. 530. Dick. 533. — 4. Nor, as laid down by the principal position, is a fraudulent outlawry in Ireland. Stone, 172. Billing. 94. Good. 23. — 5. So if a trader depart from England, without any intent to delay his creditors, but when abroad resolve not to return, though for the purpose of avoiding his creditors, it is not, it seems, an act of bankruptcy. 1 Mont. 32.

(*x*) But one in the county palatine of Durham does. Stone, 124. Billing. 94. Good. 23.

(*a*) 1 Keb. 11. 2 Sid. 69. 114. 176.

(*b*) See vide Cooke, 85.

(C 6.) Escape

(C 6.) Escape, or covinous bail.

So by the st. 21 Jac. 19. if any, &c. being arrested for 100*l*. or more of just debt, shall after such arrest escape (*d*) out of prison, or procure his enlargement, by putting in common or hired bail.

But now by the st. 10 Ann. 15. every act which relates to the description of a bankrupt by procuring his enlargement by common and hired bail is repealed from the 20 April, 1712; provided, not to avoid any act, sale, or disposition, &c. on a commission taken out before.

(C 7.) Protection, or bill for delay.

So by the st. 21 Jac. 19. if any, &c. by himself or others, with his procurement, obtain any protection (*e*), unless a person lawfully protected by the privilege of parliament.

Or shall prefer to the king or any of the king's courts any petition or bill against any of his creditors, to enforce them to accept less than the just and principal debt, or to procure a longer day of payment than was given by the original contract, he shall be adjudged a bankrupt.

But if the creditors, upon request, enlarge the time for payment, it does not make him a bankrupt.

So, if any one be protected as the king's servant. R. Skin. 21. (*f*)

(C 8.) Fraudulent conveyance.

So by the st. 1 Jac. 15. if any, &c. shall make or cause to be made any fraudulent grant or conveyance (*g*) of his lands or goods, whereby creditors,

(*d*) 1. The escape must be of such a nature as manifests the prisoner's intention to run away, and thereby defeat his creditors. 1 Burr. 437. — 2. Hence if the prisoner is carried by permission of the sheriff, through a different county in his road to a judge's chamber, upon a habeas corpus, to be committed to another prison, he does not escape within the meaning of the statute. Ibid. — 3. It seems too that it is not an escape to take a defendant seized upon a *ca. sa.* to a lock-up house. 4 Taunt. 608.

(*e*) The granting protections has fallen into disuse.

(*f*) Ambassadors and their servants are not privileged from bankruptcy. 7 Ann. c. 12. s. 5.

(*g*) 1. The alienation must be by deed. Burr. 2477. Cowp. 117. Cowp. 629. 1 Esp. 68. 7 T. R. 67. 3 Bro. 502. — 2. Which, as it seems, must be delivered absolutely, and not as an escrow. 17 Ves. 200. — 3. A fraudulent judgment and execution, though void against creditors, is not, in itself, an act of bankruptcy. Cowp. 427. — 4. Nor does a trader, by secretly conveying his goods out of his house to prevent their being taken in execution, commit an act of bankruptcy. 1 Ld. Rd. 725. — 5. A commission cannot issue as upon an act of bankruptcy by a trader resident abroad, but subject to our bankrupt laws, committed by an assignment of his effects executed abroad. 5 T. R. 530. Dick. 533. 1 Cowp. 401. — 6. Any grant or conveyance which a court of equity would declare fraudulent, is an act of bankruptcy. Burr. 478. 481. — 7. So is a voluntary conveyance, void under the statutes of bankruptcy, if fraudulent. 1 Esp. 68. — 8. So is a grant or conveyance, fraudulent within the statutes of Elizabeth against fraudulent conveyances. Dougl. 88. Good. 92. — 9. So (all essentials concurring) is assignment of book debts. 14 Ves. 186. But *quare* per Mont. 1 vol. 37. n. (k). — 10. So is an assignment of all the effects for the benefit of creditors, with a proviso to be void if all the creditors do not execute; but that in the mean time the acts of trustees shall be good. 4 Camp. 232. — 11. So likewise, notwithstanding a simple proviso, that it shall be void, if all the creditors do not assent to it. 3 Esp. 229. 17 Ves. 194. 4 East, 431. — 12. So is a grant or conveyance, by an insolvent trader, of the whole of his property as a floating security to

to the grantee, for all sums of money that he may advance on any bill of the trader's, if the trader continue in possession upon a secret trust for the grantee, to whom he delivers possession on the eve of bankruptcy. Burr. 827.—13. So is a grant or conveyance by a trader, for the satisfaction of any part of his debts, or to indemnify against the contingency of loss, a person who, previous to the grant or conveyance, has become surety for the trader, if made with intent to give the grantee a preference in the event of a bankruptcy. 2 Mont. note S. 11 East, 260. Dougl. 88. Vide Burr. 481. 1 T. R. 155.—14. So is a bill of sale, by a trader, of the whole of his property to a friend who advances a sum to pay off an execution. 5 Esp. 80.—15. So is a grant or conveyance by a trader, under an arrest of the whole of his property to a creditor, to secure a sum of money, which the creditor advances to pay the debt for which the trader is arrested, and to pay the debt due to the creditor. Dougl. 282.—16. So if a trader being in custody upon an arrest, and knowing himself to be insolvent, give, in order to procure his release, to the arresting creditor, a bill of sale of all his effects and stock in trade to satisfy the debt and pay off the residue, it is an act of bankruptcy. 7 East, 138.—17. So is a conveyance of land by a trader, in trust to sell and pay an urgent creditor, with a further trust to pay debts to relatives not pressing, in contemplation of bankruptcy. 3 Taunt. 241.—18. So is a grant or conveyance by an insolvent trader, against whom there is an existing judgment or decree, to a person, with knowledge of such judgment or decree, if made to defeat the creditor, although the consideration is full and valuable. 2 Mont. note, 2 A.—19. But no grant or conveyance made by a trader, in consideration of property advanced at the time of making the grant or conveyance, is an act of bankruptcy. Esp. 68.—20. Nor is a fraudulent surrender of a copyhold. 3 Bro. 502. Dougl. 88.—21. Nor is an agreement whereby an insolvent undertakes to pay a composition by instalments, and authorizes the creditors, in case of default, to take possession of all his goods. 3 Esp. 228.—22. And where A. and B. are partners and insolvent, an assignment to B. from A. in trust for the wife of B., who is the daughter of A., is no act of bankruptcy by B., though a party to the deed. 1 Esp. 68.—23. *Quære*, whether a deed executed only by a trader, but not by a trustee or a creditor, is an act of bankruptcy. 1 Holt, 15.—24. *Quære*, too, whether an assignment by a debtor, of policies of insurance on his life, is one. 2 B. & P. 230.—25. A conveyance by a trader of all his effects by deed, to the exclusion of one or more of his creditors, is an act of bankruptcy. 2 Cowp. 632.—26. Though it be by way of security, and for valuable consideration. 1 Burr. 467. 2 Burr. 827. Dougl. 294.—27. And whether possession be delivered or not. 1 Burr. 467. 2 Burr. 827. Dougl. 294.—28. And though the trader was under the arrest of the creditor to whom the deed was executed. 7 East, 138.—29. And though the trader is under the influence of the fear of legal process at the time of making the grant or conveyance. Dougl. 282. 7 East, 549.—30. So is an assignment of all a trader's effects for the benefit of all his creditors, unless every creditor had concurred. B. N. P. 40. 4 Burr. 2240. 1 Cowp. 123. 16 Ves. 148.—31. So is a grant or conveyance by a trader of the whole of his property, to be equally distributed amongst his creditors, for the satisfaction of part of his debt, unless it be made with the consent of every creditor. 2 Mont. note U.—32. If a trader call a meeting of his creditors, at which it is resolved that he shall assign all his property in trust for the benefit of his creditors, with an intention that it shall be a valid operative deed, for the purpose of the trust; and if between the time of such resolution, and the time of actually executing, the creditors resolve, without the privity of the trader, to procure an execution of the deed, for the express purpose of making the trader a bankrupt, and the deed is executed accordingly, it is an act of bankruptcy. 4 East, 230.—33. So is a grant or conveyance by a trader of the whole of his property for the satisfaction of any part of his debts, or to indemnify against the contingency of loss a person who, previous to the grant or conveyance, has become surety for the trader, unless made with consent of every creditor. Cooke, 86. B. N. P. 40. 4 Burr. 2235. 8 T. R. 521. Burr. 477. Dougl. 88. Vide 1 Blk. 441. Cowp. 117. 629. 6 T. R. 134.—34. Although the amount of the debt is inconsiderable, compared to the amount of the property assigned, and the trader is in credit, at the time of making the grant or conveyance, and does not openly fail, till many years after it is made. Dougl. 88.—35. So is a grant or conveyance by a trader of all his stock in trade, or of so much as to incapacitate him from trading, or of all his household goods. 1 Blk. 441.—36. So is a grant or conveyance by a trader, for the satisfaction of any part of his debts, creating an insolvency. 1 Blk. 441.—37. So it seems is a grant or conveyance by a trader, for the satisfaction of any part of his debts, of so much of his property as, when actually transferred, will disable him from trading, unless it be made with the consent of every creditor. 2 Mont. note X.—38. And a colourable exception, or an exception of only a small part, will not make a grant or conveyance

ditors, being subjects, may be defeated or delayed, he shall be judged a bankrupt.

And therefore, if he makes a grant or conveyance fraudulent within the st. 13 El. or the st. 27 El. it makes him a bankrupt. Vide what conveyances are fraudulent within these statutes, Covin, (B 2, &c.)

And

conveyance valid. Burr. 477. Vide Burr. 827. 1 Blk. 362. 441. 4 Burr. 2235. Cowp. 117. 629. — 39. So a mortgage of two leasehold messuages, and all the trader's stock in trade, but his household goods and debts, which were very trifling, were not included, was considered fraudulent, and an act of bankruptcy, as being an assignment of all his stock in trade, without which he could not carry on business. 2 Blk. Rep. 996. — 40. And what grant or conveyance by a trader for the satisfaction of any part of his debts, of so much of his property as, when actually transferred, will not disable him from trading, is an act of bankruptcy, from being made with an intent to give the grantee a preference, in the event of a bankruptcy, or is valid from being made with any other intent, must be determined by the particular circumstances of each case. 2 Blk. 996. — 41. And though cases have occurred, in which an assignment by deed of part of a trader's effects made when the party had a bankruptcy in contemplation, was not an act of bankruptcy. 2 P. Wms. 427. Burr. 480. 1 Blk. 441. Yet their authority is questionable, see 3 Wils. 47. Cowp. 124. Dougl. 86. Cooke, 94. — 42. On the other hand, if a trader executes an assignment by deed of part of his effects, and delivers possession, or a nominal possession, and it does not appear that he had his bankruptcy in contemplation, the assignment will be good, and not an act of bankruptcy. 1 Burr. 478. 481. 7 T. R. 67. — 43. Every case of an act of bankruptcy by deed, proceeds upon the ground of its being a fraud upon the bankrupt laws. 2 Cowp. 629. — 44. And valid transactions, as between the parties, may be fraudulent by reason of covin, collusion, or confederacy to injure a third person. 1 Burr. 474. — 45. Fraud is sometimes a mere matter of fact, and sometimes the conclusion of law arising upon facts. Burr. 467. Vide Burr. 937. 2 P. Wms. 427. Blk. 441. Burr. 2477. 1 T. R. 155. 1 B. & P. 283. 7 T. R. — 46. In an inquiry whether a grant or conveyance for a present consideration is fraudulent, the value of the property withdrawn, and the tangibility of the substituted property, are proper considerations for a jury. 6 East, 259. — 47. If the words of the grant or conveyance are general, fraud may be presumed. 2 Burr. 827. 4 Burr. 2235. Burr. 478. 3 Rep. 81. — 48. So if it is falsely dated. 2 Burr. 827. 1 Bos. & Pul. 283. — 49. So if it is executed in private. 2 Burr. 827. Vide Burr. 478. 3 Rep. 81. — 50. So if it is made at an unreasonable hour. 1 Blk. 362. Cowp. 117. Bos. & Pul. 582. 11 East, 260. — 51. So if it is to secure a larger sum than is actually due. 2 Burr. 827. — 52. So if it is to secure an unliquidated demand. 2 Burr. 827. — 53. So if the grantor suppress any evidence by which the intent of the grant or conveyance may be elucidated. 4 Burr. 2235. Burr. 467. Dougl. 86. — 54. In an absolute grant or conveyance of personal chattels by a trader to his creditor, the non-delivery of exclusive possession in the best manner which the nature of the case admits, is strong, if not conclusive evidence of fraud. 3 Rep. 81. Burr. 467. 2 T. R. 587. 5 T. R. 239. 2 B. & P. 60. 5 Esp. 22. 1 Camp. 332. — 55. And possession of personal chattels must be delivered, although the grant or conveyance include real property or chattels real. 3 Rep. 81. Burr. 467. 2 Blk. 996. — 56. So where the grant or conveyance is absolute upon the face of it, notwithstanding it is understood between the parties that there shall be a condition attending it. 2 T. R. 597. See 7 T. R. 67. — 57. A delivery of nominal possession of property, apparently in the possession of the grantor, is not sufficient, when actual possession can be delivered. Burr. 827. Dougl. 86. — 58. But it seems to be sufficient when the property, both before and after the grant or conveyance, is apparently in the possession of the grantee. 7 T. R. 71. — 59. The delivery of possession is only presumptive evidence of the honesty of the transaction. Burr. 467. Dougl. 282. 9 East, 240. 5 Esp. 22. 7 East, 138. — 60. If the grant or conveyance is made upon the eve of the bankruptcy, fraud may be presumed. 4 East, 210. — 61. On the other hand, a grant or conveyance may be an act of bankruptcy, although it is made many years before the open failure. 2 Blk. 996. Dougl. 88. — 62. If the grant or conveyance is made voluntarily, without any application by the grantee, fraud may be presumed. 1 Mont. 43. — 63. So if made without the privity of the creditor. 2 P. Wms. 427.; vide Cowp. 117. 4 Burr. 2235. — 64. So if the application by the creditor is collusive between him and the debtor. 4 Burr. 2235.

And if he makes a fraudulent grant, &c. he will be a bankrupt, though he afterwards appears publicly upon the exchange, &c. Semb. cont. Hutt. 42. (g)

(C 9.) To

6 T. R. 152. — 65. So if the grant or conveyance is made in consequence of a trader's voluntarily communicating his insolvency to the holder of one of his bills, and before the bill is due; and of the holder's then pressing for payment, and promising, in the event of payment, to be security to his creditors for so much as the estate will produce, if they will agree to a composition, it is an act of bankruptcy. 1 B. & P. 283. — 66. So a grant, or conveyance by a trader, of part of his property, executed in consequence of the pressure of a creditor, and from fear that hostile measures will be adopted against him, if it contain provisions in favour of some relations of the trader's, which are voluntary, and to give them a preference, in contemplation of bankruptcy, is an act of bankruptcy. 3 Taunt. 241. — 67. But if the grant or conveyance is made upon an application by a creditor for payment or for security, it is not an act of bankruptcy. 2 Mont. note Y. — 68. Though the trader knows, at the time of making it, that his failure is inevitable. 2 Mont. note Z. — 69. It seems too, that the knowledge by the creditor of the insolvency of the trader, does not raise a presumption that the grant or conveyance is an act of bankruptcy. 1 Ves. 280. B. & P. 582. — 70. So if the grant or conveyance is made in consequence of an application by the creditor, and from the impression upon the mind of the debtor of a moral obligation to give security for the debt, it is not an act of bankruptcy. 2 Mont. note Y.; sed vide 3 Ves. 85. B. & P. 582. 11 East, 261. — 71. Nor is it, because the application by the creditor is to give further security for a debt secured upon an instrument not payable till a future day. B. & P. 283. 582.; vide 1 T. R. 155. 11 East, 260. — 72. Nor because legal process was not threatened. 2 Mont. note Y. — 73. So any transfer by a trader of part of his property, made under an apprehension that a degree of force, civil or criminal, is about to be applied, is valid. 1 Stark. 88. — 74. So if the grant or conveyance is made in consequence of a well or ill-founded fear of legal process. 1 T. R. 155.; vide Dougl. 282. — 75. So if a trader, under the apprehension that his creditor will proceed against him for forgery, transfer property in liquidation of the debt, and two days after such transfer he commit an act of bankruptcy by departure from the realm, the transfer is valid. 1 Starkie, 88. — 76. And an agreement to keep execution secret, and that the person against whom it is executed shall return the goods, is not an act of bankruptcy, where the execution itself is adverse, though it is void against creditors. Loft. 121, 2. — 77. The trader's solvency, at the time of the execution of the grant or conveyance, is presumptive evidence of the honesty of the transaction. 10 Mod. 489. Cowp. 455. Dougl. 88. — 78. So is the grant or conveyance, being beneficial to the general creditors. 2 P. Wms. 427. 7 T. R. 67. — 79. So the grant or conveyance, being made in consequence of a prior fair agreement. 2 P. Wms. 427. Vide Cowp. 117. 1 B. & P. 283. — 80. So if the grant or conveyance is of such a nature as a court of equity would have compelled the trader to execute, it is not an act of bankruptcy. 10 Mod. 489. Burr. 478. Dougl. 86. — 81. A fraudulent conveyance cannot be read to support the commission, if unstamped. Peake, 168. — 82. If three partners propose to convey their property to trustees for their creditors, and the deed is incapable of being executed according to the trust, unless it is executed by all the three partners; if it is executed only by one of the partners, it is not an act of bankruptcy by him who executes it. 15 East, 212. 17 Ves. 202. — 83. Assignment by partners by deed of property, proved to be all their property, in trust for their creditors, with a proviso to be void if all the creditors for above 20% should not execute, or a commission of bankruptcy should issue within a certain time, is an act of bankruptcy; not where the deed being joint and not several one never executed. 17 Ves. jun. 195. — 84. A assigns all his stock by a deed to which B. is party, B. cannot sue out a commission upon this act of bankruptcy. 2 Camp. 49.

(g) 1. By 5 Geo. 2. c. 30. s. 24. if any bankrupt shall, after issuing of commission, pay to the person who sued out the same, or otherwise give or deliver to him goods or other satisfaction or security for his debt, whereby such person has and receives more in the pound in respect of his debt than the other creditors; such payment, &c. shall be deemed such an act of bankruptcy that commission may be superseded, and another awarded. — 2. The payment, or giving security, to constitute an act of bankruptcy,

(C 9.) To what time (*h*) it shall relate.

If a man becomes bankrupt by continuance in prison for two months after an arrest, or for not compounding within six months, or by a discharge upon common or hired bail, by the st. 21 Jac. 19. he shall be adjudged a bankrupt from the time of his first arrest.

So, if after an arrest, he escapes.

If upon an arrest he gives bail, and afterwards is arrested by another, and continues in prison two months, he shall be a bankrupt from the first arrest. Per Holt, 1 Sal. 111.

So, if upon an arrest he gives bail, and afterwards surrenders himself in discharge of his bail. Semb. per Holt, 1 Sal. 111. Vide infra.

If a bankrupt gives away his goods, &c. after the commission issues, it will be void. R. 2 Co. 26. a. Vide post (D 16.)

Though it be for satisfaction of a just debt. R. 2 Co. 26. a.

So, if he makes a gift to a creditor, or a disposition of his goods, &c. after an act of bankruptcy committed, and before a commission granted, the gift, or disposition will be void; for by the st. 13 El. 7. the bargain and sale by the commissioners, &c. shall be good against the offender, his wife, heirs, &c. and all claiming under him by any act after he first became a bankrupt. 2 Co. 26. (i)

But

ruptcy, must be after a commission has issued. 1 Ves. 157. 3 Ves. 349. 14 Ves. 85. 15 Ves. 462. 472.—3. The obtaining payment or security seems to be an act of bankruptcy, although it is uncertain at the time whether the creditor will receive more than the other creditors. 15 Ves. 463.—4. The payment by the bankrupt of part of the petitioning creditor's debt, with a grant of security for the remainder, on condition that the commission died away, is sufficient evidence of bankruptcy, without proof that other creditors were damaged. Cooke, 95.—5. The knowledge by one or two of a body of creditors that the petitioning creditor receives payment or satisfaction from the bankrupt, is not sufficient publicity to prevent the operation of the statute: there must be a general communication. 15 Ves. 464.—6. By 4 G. 3. c. 35. traders having privilege of parliament deemed bankrupts, if money due not paid, &c. in two months after personal service of summons; and their persons only privileged, if act of bankruptcy committed.—7. So privileged trader must appear to process in two months, or deemed bankrupt.—8. So privileged trader deemed bankrupt in default of payment of money within eight days after service of order of chancery or exchequer.—9. If the affidavit in the court of common law do not state positively that the person is a member of parliament, it seems that it is not sufficient to constitute an act of bankruptcy. 2 Rose, 204.—10. Semble, it ought to appear upon the deposition, as an ingredient of the act of bankruptcy under 4 Geo. 3. c. 33. that the summons required to be served on the trader M. P. was taken out after the affidavit was filed of record. 2 Rose, 203.

(*h*) There is no fictitious relation of the act to the beginning of the day; hence the date of the act and of the commission may be the same. 14 Ves. 80. 1 V. & B. 54.

(*i*) The relation to the act of bankrupt in this latter point of view may be treated thus:—

First—General rules.

Secondly—What shall be an issuing of the commission within the stat. 46 Geo. c. 136. and 49 Geo. 3. c. 121.

Thirdly—What shall be an insolvency within them.

Fourthly—What shall be a money payment within the statute.

Fifthly—Payments by or on behalf of the bankrupt, in respect of goods sold, when protected.

Sixthly—Payments by or on behalf of the bankrupt, in respect of goods sold, when not protected.

But if a man upon an arrest gives bail, and afterwards surrenders himself in discharge of his bail, he shall not be a bankrupt from the first arrest ;

Seventhly—Payments by or on behalf of the bankrupt, in respect of bills of exchange, when protected.

Eighthly—Payments by or on behalf of the bankrupt, in respect of bills of exchange, when not protected.

Ninthly—Payments to the bankrupt, when protected.

Tenthly—Payments to the bankrupt, when not protected.

Eleventhly—Purchasers from the bankrupt, when protected.

Twelfthly—Purchasers from the bankrupt, when not protected.

Thirteenthly—Other dispositions of the bankrupt's property, when protected.

Fourteenthly—Other dispositions of the bankrupt's property, when not protected.

Fifteenthly—Liability of third persons implicated in unauthorized transactions. — And

First—General Rules.

1. The general rule is, that the commissioners assignment has relation to the act of bankruptcy, avoiding all intermediate transactions. — 2. Avoiding not only acts *in pais*, and rescinding every contract made or completed after the bankruptcy, but also acts upon record, and legal acts done by the bankrupt; so that if execution is taken out, after the act committed, upon a judgment before, the execution may be invalidated. 2 Blk. Com. 485. 1 P. Wms. 92. Vide 2 Vern. 229. 1 Blk. 65. 1 P. Wms. 737. 3 Lev. 58. Skin. 21. 8 T. R. 199. — 3. Which relation, in the case of bankruptcy, by lying in prison, as reference to the first day. 1 Burr. 437. 2 Burr. 814. 1 Atk. 260. Willes, 464. Davies, 376. 2 T. R. 141. 1 Ves. & Beam. 52. — 4. It seems that no transaction can be invalidated, by relation to an act of bankruptcy previous to the debt of the petitioning creditor. 2 Maule & Selwyn, 479. 2 Rose, 71. 2 Mont. note 6 E. — 5. And when the execution and act of bankruptcy are upon the same day, the priority may be ascertained. 4 Camp. 197. 8 Ves. 82. — 6. The doctrine of relation is not favoured by the courts. 2 Mont. note 6 D. — 7. Neither is the avoidance of acts done without notice of the bankruptcy. 1 Vern. 27. 1 Ves. 326. 1 Blk. 642. — 8. Nor will a court of law, upon motion, render any assistance to enforce this relation in a case where no advantage can be taken of it by the regular course of law. 1 Blk. 642. — 9. Its severity has been mitigated by several statutes*, which in certain situations make exceptions to the general rule of relation. These statutes are, 1 Jac. 1. c. 15. s. 14. 19 Geo. 2. c. 32. 21 Jac. 1. c. 19. s. 14. 46 Geo. 3. c. 135. s. 1. 3. 49 Geo. 3. c. 121. s. 1. 3. 56 Geo. 3. c. 137. — 10. And the sum of their provisions, applied to two classes of transactions, namely, transactions *with notice* of the act of bankruptcy, and transactions *without notice*, is as follows †: *With notice*, no transaction is valid, not even the single case of a purchaser for value, and no commission issuing within five years after the act of bankruptcy. 7 Vin. 119. *Without notice* ‡, *all transactions* (including process against property), dated two calendar months before the date of the commission, are protected; and transactions of a *particular class*, though done within two such months, are protected likewise, namely, all *payments* of debts to the bankrupt, and payments by the bankrupt, in the usual and ordinary course of trade and

* Compulsory payments, to one having committed an act of bankruptcy, by judicial proceedings, are protected by common law, and therefore though with notice.

† Assuming that the stat. of the 46th of the king, contains no implied negatives trenching upon the statutes of James and George the second.

‡ The issuing of a commission is a public act, of which all are bound to take notice. *Hitchcock v. Sedgwick*, 2 Vern. 156.; and it seems that knowledge of the bankruptcy, by an agent making a payment for a company, is knowledge by the company. 1 Mont. 547. By stat. 46 Geo. 3. c. 135, s. 3. the issuing of a commission, though it be afterwards superseded, is sufficient notice of a prior act of bankruptcy, if an act of bankruptcy were actually committed at the time of issuing such commission.

arrest; for the statute shall be intended only, where he continues in prison upon the arrest. R. 1 Sal. 109. Adm. 3 Lev. 58. 1 Vent. 370. Semb.

dealing, in respect of goods sold *, or bills † of exchange ‡ drawn, negotiated or accepted, in such course §, and all deliveries to the bankrupt, or his order, of goods, wares, merchandizes, and effects, his property.— 11. These provisions are to receive a liberal construction, semble. 7 T. R. 713. 5 T. R. 197.

Secondly—What shall be an issuing of the commission within the stat. 46 Geo. 3. c. 135. and 49 Geo. 3. c. 121.

12. The issuing of the commission means, in these statutes, merely its passing the great seal. It is immaterial whether it be opened and acted upon or not. 3 Camp. 308.

Thirdly—What shall be an insolvency within them.

13. To invalidate a payment made by a bankrupt, more than two months before the date of the commission, it is not sufficient to shew, that the creditor had renewed bills for the debtor, in consequence of the inability of the latter to provide for them; the insolvency mentioned in the statute, meaning a general inability to answer engagements. 1 Camp. 492.— 14. But paying off one's creditors by small portions as one can raise money, is a state of insolvency. 1 M. & S. 338. 353, 4, 5.— 15. Insolvency means an inability to make one's payments as usual. Ibid.— 16. The mere dishonour or removal of a bill, is not notice of insolvency. Ibid.— 17. An arrest is slight evidence of the creditor's knowledge of the debtor's insolvency. 2 B. & P. 399. vide etiam 2 B. & P. 398.

Fourthly—What shall be a money payment within the statutes,

18. Doubts seem to have been entertained, whether the statute extends to any payments except to money payments. 1 Mont. 540; vide infra, in the case of payments to bankrupts.— 19. The indorsement by a debtor of a bill after a secret act of bankruptcy, and receipt by the creditor of its contents, before a commission issues, is protected. 2 Ves. 550.

Fifthly—Payments by or on behalf of the bankrupt, in respect of goods sold, when protected.

20. Payment by a trader, after a secret act of bankruptcy, under and in consequence of an arrest, is protected. 2 B. & P. 399. confirmed in 2 B. & P. 398. but see *Ld. Ellenborough's* judgment in 1 M. & S. 350.— 21. Or made upon bringing an officer with a writ into his shop. 2 B. & P. 398.— 22. But whether a payment made in consequence of a seizure and sale of effects under an execution; or a payment by a trader to prevent a seizure; or to redeem the goods after seizure; or to redeem his person after he is taken in execution, is a payment in the course of trade, has not been decided. 1 Mont. 543.

Sixthly—Payments by or on behalf of the bankrupt in respect of goods sold, when not protected.

23. Payments by a bankrupt protected by stat. 19 Geo. 2. c. 32. s. 1. are confined to the two cases therein specified. 5 T. R. 197.— 24. And also to payments made by the bankrupt himself, or his authorized agent, excluding payments by a stranger upon compulsory process, such as garnishment, or for bankrupt's accommodation. 7 East, 154. 3 Smith, 156. See 1 Stark. 147.— 25. Payment upon the debtor's soliciting his creditor to receive the money, seems not to be a payment in the course of

* *Quære*, whether the term is limited to the description of goods in which both parties, or either of them deal. See 1 Christ. 609.

† *Quære*, if limited to bills for goods sold in the usual course of trade? Semb., not. Christ. 610, 611.

‡ *Quære*, whether a promissory note is within the statute of George the second. *Harwood v. Lomas*, 11 East, 127. See Mr. Christian's reasons for thinking that it is not. 1 Christ. 608.

§ Which last words apply, in Mr. Christian's judgment, as well to goods sold as to bills drawn, &c. 1 Christian, 609.

Semb. cont. per Holt, 1 Sal. 111. R. acc. 2 Sho. 253. Ray. 479. R. 2 Sho. 512. 525. But per Sho. there dub. per 2 J. North cont. Skin. 22. R. *per totam curiam* 4 Ja. 2. Skin. 270.

(D.) Com-

trade. 1 B. & P. 283. — 26. Money paid by a trader to a carrier, after a secret act of bankruptcy, for the carriage of goods, is not protected. 5 T. R. 197. — 27. Reimbursement of acceptance and payment of bills (by a factor under agreement to advance money upon the goods consigned to him by a trader having committed a secret act of bankruptcy) by sale of the property, is not protected. 8 T. R. 199. — 28. Where a debtor, under arrest and detainers, sends for and pays all the respective plaintiffs save one, the payments are not protected. 3 B. & P. 237. — 29. Payment by a trader, by minute portions to each of his creditors, is not in the course of trade. 1 M. & S. 345. — 30. And the payment by a trader of interest upon an overdue debt, is evidence that the payment is not in the ordinary course. *Id.* p. 346. — 31. *Vide etiam* 3 Bro. 47. a case of a loan, and not a payment.

Seventhly—Payments by or on behalf of the bankrupt in respect of bills of exchange, when protected.

32. Payment of a bill upon and in consequence of an arrest thereon, after a secret act of bankruptcy, is a payment in the course of trade. 2 B. & P. 398. 9 Ves. 515. — 33. A payment by a trader, after having had time given to him for payment, but not upon an over-due security, may, as it seems, be protected by the statute. See judgment of Eyre, J. in 2 B. & P. 399. — 34. A trader, after a secret act of bankruptcy, gave his acceptance to a creditor for a pre-existing debt, and placed in his hands as a farther security, certain policies of insurance; which in consequence of loss, became of no value. The policy broker, at the bankrupt's request, gave his own acceptance to the creditor, to induce him to give up the policies, which acceptance was afterwards paid to the creditor. Held, that it was the broker's not the bankrupt's property which the creditor had received, and therefore could not be recovered by the assignees. 7 East, 164. — 35. And note, that the assignees cannot follow through the hands of *bonâ fide* holders for value, bank notes received for the bankrupt's property. 13 East, 150.

Eighthly—Payments by or on behalf of the bankrupt in respect of bills of exchange, when not protected.

36. *Vide supra*, pl. 23, 24. — 37. If upon a bill becoming due, the holder agrees that it shall remain with the drawee at interest, who some time after discharges it, having, unknown to the holder, committed an act of bankruptcy between the agreement and payment of the bill, the payment is not protected. 2 T. R. 648. — 38. A person recovered a verdict against a trader for freight; after which the trader committed a secret act of bankruptcy, and then prevailed upon the creditor, instead of immediately entering up judgment, and taking out execution, to take a bill, drawn by the trader upon a third person. The payment of the bill is not protected. 2 H. B. 334. — 39. Bankers are not protected in paying a customer's drafts, after notice that he has committed an act of bankruptcy. 2 T. R. 115. 3 Bro. 313. 3 Ves. 757. — 40. And if a banker, not having assets, pay an acceptance of his customer, who, after having committed a secret act of bankruptcy, remits the amount to the banker, this payment is not in the course of trade. 3 Camp. 533. 1 Mars. 128. 5 Taunt. 444. — 41. A payment to meet an accommodation bill not due, is not a payment in the course of trade. 2 Camp. 312; at N. P. and in bank. — 42. Nor is the acceptance of a trader's bill, made payable at a banker's, within the statute. 5 Taunt. 444. 1 Mars. 128. — 43. Nor, *comme semble*, payment to meet an accommodation draft upon a banker. *Ibid.* et *supra*, pl. 37. — 44. And whether a note, at twelve months date, with interest half-yearly, and a deposit of a lease as a security, is a note made in the usual course of trade, has been doubted. 11 East, 151. — 45. A note for the balance of an account, consisting, amongst other articles, of money lent, is not in the usual course of trade. *Ibid.* — 46. Payment of a bill, though for value, before it is due, is not protected. 2 Camp. 312. 2 B. & P. 398.

Ninthly—Payments to the bankrupt, when protected.

47. An act of bankruptcy, not followed by a commission, does not divest the party's rights

(D.) Commission.

(D 1.) How it issues.

By the st. 13 El. 7. enlarged by the st. 1 Jac. 15. and 21 Jac. 19. the lord chancellor, or keeper, on complaint in writing that any is bankrupt,

rights; and payment to him under process, being by compulsion of law, will protect the debtor, though he knew of the bankruptcy. *Secus*, a voluntary payment. 2 T. R. 479. 3 Keb. 230. 616. *Freem.* 349. 2 B. & P. 398. — 48. But it seems that a judgment must be recovered, since otherwise it is not the law that compels the payment. *Ibid.* 1 Stark. 144. — 49. And the recovery must be *bond fide*, since if there be any fraud between the parties, by the debtor colluding with the bankrupt, in suffering a judgment to be recovered for the purpose of making a payment valid, the debtor is liable to pay it over again. 2 T. R. 479. — 50. The giving other goods in exchange, is a payment within the meaning of the statute. 7 T. R. 711. — 51. If a man who has funds in his hands belonging to a trader, who has committed a secret act of bankruptcy, accept a bill for that trader, without knowing of such act of bankruptcy, he may apply those funds, when the bill becomes due, in discharge of such acceptance, though a commission may have issued in the interim. 7 T. R. 711. — 52. And where A. being embarrassed, sent goods to B. an auctioneer, for sale; within a few days surrendered himself to prison; and remaining there two months, was declared a bankrupt; the goods were sold whilst A. lay in prison, and the proceeds were paid to his agent by B., who had no notice of A.'s imprisonment: held, that the payment was protected. 3 Camp. 184. *sed vide* 2 Ves. 101. 5, 6. 2 T. R. 141.

Tenthly—Payments to the bankrupt, when not protected.

53. Payment to a bankrupt, protected by stat. 1 Jac. 1. c. 15. s. 14. is payment, after an act of bankruptcy, of a debt existing prior to it. 3 Bro. 47. — 54. And a payment to the bankrupt, after he is in prison for debt, but before the expiration of the two months, is void, if notice to withhold it has been given to the debtor by the attorney of the future assignees. 2 T. R. 141. — 55. A person who holds property of a trader who is arrested and in prison, cannot with safety pay it. And if he be arrested by the trader, he will, as it seems, upon bringing the deposit into court, be discharged upon common bail. 2 Ves. 101.

Eleventhly—Purchasers from the bankrupt, when protected.

56. An act of bankruptcy to avoid a sale, must be before the sale. 1 Lev. 13. — 57. A purchase made between the times of two acts of bankruptcy, committed by the vendor, cannot be over-reached by a commission issuing after the lapse of five years after the first act of bankruptcy, but within five years of the last act of bankruptcy. 1 Lev. 13. — 58. Equity will not assist the assignees to avoid a purchase, either of real or of personal property, if the purchase was fair and for value, and the purchaser can defend himself at law. 2 Vern. 599. 1 Vern. 27. *Skin.* 459. *Forrest*, 65. — 59. If a purchaser without notice has not a prior legal estate in him, but only a better title or right to call for the legal estate than the assignees, equity will not assist them. 2 Vern. 599. *Forrest*, 65. — 60. And even where a purchaser had been guilty of misconduct in making a purchase, by giving much less than the value, for the purpose of defeating the vendor's creditors, the purchase stood as security for the money advanced. 1 Atk. 260. — 61. An equitable purchaser is within the statute of James. 7 Vin. 119. *vide* 5 Esp. 105. 4 Ves. 118. 9 Ves. 407. 2 Vern. 599. — 62. A. borrows 4,000*l.* B., and deposits title from deeds as a security for that sum. He afterwards obtains further advances, and, after an act of bankruptcy, signs an agreement subjecting the deposit to such further advances. B. declared to be entitled to a lien for the whole amount. 1 Rose, 26. — 63. Court refuse to interpose, though under very suspicious circumstances, against creditors who had received goods after a secret act of bankruptcy, there being no actual proof of their having had notice of it. 1 Eden, 158. and see 1 Vern. 27. *Skin.* 149. *Forrest*, 65. 13 Ves. 183. 11 Ves. 609. 1 Sch. & Lef. 152. — 64. If lands are bargained and sold by a trader before his bankruptcy, they are not

distributable, under a commission issued against him, merely because the deed is not enrolled till after the bankruptcy. Sir W. Jones, 203. — 65. If a trader agree to purchase an estate, and after payment of part of the purchase-money he commit an act of bankruptcy, equity will not compel the vendor to complete the purchase upon a bill filed by the trader. 14 Ves. 550. — 66. If a trader agree to sell an estate, and with a view to the sale he execute a deed, which is an act of bankruptcy, equity will not compel the vendee to complete the purchase, though there is no proof, except the vendor's oath, of a debt to support the commission, nor will a reference to enquire as to its existence be directed. 14 Ves. 549. — 67. In the case of goods at sea, if the writings, which are the documents of the right to the property, are delivered before the bankruptcy, even without indorsement or other regular assignment, the creditor has a right to retain the goods against the assignees. 1 Atk. 160. — 68. If a trader makes an assignment of goods at sea, as a collateral security for a debt, and undertakes to indorse the bill of lading, and deliver the goods upon their arrival, and then commits an act of bankruptcy, and afterwards indorses the bill of lading, and upon the arrival of the goods the creditor obtains possession of them, the transaction is good against the assignees. 2 T. R. 485. — 69. A. ships goods for Hamburgh, and makes out the bills of lading in the name of S. and M., who have no interest in the property; and deposits these bills of lading with B. as a collateral security for his acceptance of A.'s drafts. B. pays his acceptances, and A. becomes bankrupt. B. has a legal claim to the proceeds of the cargo. 1 Camp. 554. — 70. If a bankrupt draw a bill payable to his own order, having at the time no effects in the hands of the drawee, or if having effects he draw it for a sum exceeding their amount, and the bill be accepted for his accommodation, his indorsement will, in the former case, confer a good title as to the whole sum mentioned in the bill; and in the latter, as to such sum as is not covered by the effects. 5 East, 317. Willis v. Freeman, 12 East, 656. — 71. A bill delivered for value by a party before, may be indorsed by him after his bankruptcy. Peake, 50. Esp. 40. — 72. Though a disclosure of the consideration will be compelled, or an issue as to notice be directed, yet a disclosure as to the time of the purchase will not. Anon. Skin. 149. Barwell v. Ward. 1 Atk. 261. Collet v. De Golls. Forrest, 65. — 73. See 2 T. R. 115. — 74. See 8 T. R. 521.

Twelfthly—Purchasers from the bankrupt, when not protected.

75. The statute of James protects only purchasers without notice. Supra. — 76. A subsequent act of bankruptcy will not defeat the interest which creditors acquire in the bankrupt's estate by a prior act. 1 Salk. 108. — 77. A purchase, made after various acts of bankruptcy, may be over-reached by a commission issuing within five years from the last act of bankruptcy, but after the lapse of five years from the first. 1 Keb. 72. 1 Keb. 11. — 78. Assignees may have trover for goods delivered by bankrupt, upon sale or return, after a secret act of bankruptcy. 2 Stark. 306. — 79. If a trader, four days before he commits an act of bankruptcy, assign by bill of sale some shares of a ship at sea to a creditor, who does not comply with any of the requisites of the register acts till three weeks after such assignment, the shares so assigned are distributable. 2 East, 599. — 80. A trader, after an act of bankruptcy, cannot create a lien upon his property. 8 T. R. 199. — 81. Where a trader mortgaged premises, then committed several acts of bankruptcy, and afterwards made a second mortgage to the assignee of the first mortgage, the mortgagee was not permitted to tack the second mortgage against the assignees, though without notice, and though having the legal estate. 13 Ves. 103. and see 11 Ves. 609.; see Forrest, 65. — 82. And it is now the constant practice for the assignees to compel a redemption, upon payment only of what was advanced before the bankruptcy. Per Lord Redesdale in 1 Sch. & Lef. 152. — 83. A transfer of deeds from a depository, in whose possession they constituted an equitable mortgage, to the person who discharged his debt, not considered as an assignment from him, so as to over-reach an act of bankruptcy, against the express words of a defeazance on a warrant of attorney, stating that the deeds had been deposited by the bankrupt himself. 1 Rose, 268. — 84. A bond assigned as security for money paid to the use of a person, who had committed a secret act of bankruptcy, cannot be retained against the assignees under the bankruptcy. 3 Ves. 757. — 85. See 2 T. R. 113.

Thirtiethly—Other dispositions of the bankrupt's property, when protected.

86. When the execution and act of bankruptcy are upon the same day, the priority may be ascertained. 4 Camp. 147. 8 Ves. 82. — 87. Money owing out of England (as in the plantations) to a bankrupt, may be attached by the law of the place, after the bankruptcy, for a debt due before. Dougl. 170. — 88. Property attached in Jersey
eing

bankrupt, by commission under the great seal shall appoint such (k) as he thinks fit, &c.

But,

being by the laws of that island vested in the creditor attaching, upon confirmation by the court of the island, in the case of a bankruptcy it was held, that the creditors attaching were entitled to hold the property attached, and to prove for the residue, where the act of bankruptcy was subsequent to the completion of the judicial act, whether on the same or any other day; but where the act of bankruptcy was previous, they could not hold against the assignees. 8 Ves. 32. — 89. P., a partner in two houses of trade, originating in the West Indies, where his partners continue to carry on the business, but being himself resident in London, receiving and disposing of consignments from, and shipping cargoes to, his partners abroad, becomes bankrupt. On bill by his assignees against a creditor of the two firms, having attached in the West Indies property belonging to both, for an account of what he had received by means of his attachments; held that defendant was entitled to retain what he had received, to the extent of satisfying his joint debts, and to account only for the overplus; different from the cases where the bankrupt was the sole debtor, and where the trade was in England only, and the attachment laid in London. 3 Mer. 279. — 90. If before an act of bankruptcy, a trader place goods in the hands of a factor for sale, the latter may sell after the bankruptcy, and may retain the proceeds to answer his own debt. 4 Esp. 233. — 91. A. draws on C. in favour of B.; C. accepts, in expectation of goods of A., which do not come to his hands till after A. has committed an act of bankruptcy. This is not such a receiving by B. of the proceeds of the goods, as will subject him to an action for money had and received at the suit of A.'s assignees. 1 Stark. 481. — 92. If a trader execute a power of attorney, to execute the indorsement of sale upon the register of a ship when she returns home, and he become a bankrupt before she returns, the power of attorney is not invalidated by the bankruptcy. 1 Buck. 394. — 93. If a debtor gives his creditor a draft upon the executor to a debtor of the debtor's and the executor takes the draft into his possession, and promise to pay it when there are funds for this purpose; though the debtor become bankrupt before payment, the creditor is entitled. 1 Madd. 53. — 94. If a trader, after a secret act of bankruptcy, pay a premium with his son upon binding him apprentice, and the transaction is without fraud, the assignees cannot recover it back. 3 Lev. 58.; but see Skin. 21; see 8 T. R. 188. d. of *Ld. Kenyon*. — 95. If a trader after an act of bankruptcy rent premises, the landlord may distrain his goods for rent in arrear. 2 T. R. 610. — 96. One of two joint debtors, who with the knowledge of the creditor, commits an act of bankruptcy, may give a separate security, so as to enable the creditor to prove against his separate estate, under a commission which issues upon the debt of a petitioning creditor contracted after such act of bankruptcy. 2 M. & S. 479.

Fourteenthly—Other dispositions of the bankrupt's property, when not protected.

97. Injunction against proceeding under a foreign attachment by a joint creditor upon a separate commission of bankruptcy, over-reaching the attachment by relation to the act of bankruptcy. 9 Ves. 78. — 98. An execution over-reached by a prior act of bankruptcy. 11 Ves. 84. Vide *st.* 49 Geo. 3. c. 13. — 99. If after the assignment of a bankrupt's estate, a creditor knowing it, and residing in England, attach the money of the bankrupt abroad, the assignees may recover it. 1 H. B. 665. 4 T. R. 182. 2 H. B. 402. — 100. Attachment in the West Indies over-reached by bankruptcy. 11 Ves. 83. Vide *supra*, pl. 98. — 101. If a trader, when abroad, direct the proceeds of a cargo to be remitted to his agent in England, upon whom he is in the habit of drawing bills; and such proceeds are so remitted by a draft, after an act of bankruptcy committed by the trader, and such draft arrive in England after a commission of bankruptcy has issued against the agent, and is received by the assignees, they are entitled to retain it. 1 Stark. 150. — 102. A trader gives a power of attorney to enable a creditor to receive money for his own reimbursement. Money received under this power, after an act of bankruptcy, cannot be retained against the assignees. 5 Esp. 158. — 103. An award, in an adversary suit, made after bankruptcy, will be set aside. 2 Vern. 229. *Mr. Raithby's note.*

(k) 1. A creditor is ineligible as a commissioner. 2 Rose, 370. 2 Mad. 292. 1 Buck. 70. — 2. In a country commission two barristers resident near the place shall be inserted in the list of commissioners; and no quorum commissioner unless a barrister. General Order, 12 August 1800. — 3. Barristers who cannot attend for 20s. are not within it. 1 Rose, 58. — 4. No London commissioner's name shall be inserted in any country commission, without a certificate from such commissioner, that it is with his consent.

But, *ex cautela*, the chancellor, before the commission is granted, usually requires a petition of the creditors, and an affidavit that they believe him to be a bankrupt. (2)

And

consent. General Order, 3 Feb. 1802. — 5. General order respecting the requisite certificate, upon applying for particular commissioners, that they are not creditors. 1 Buck, 108. — 6. Commissioners removed for misconduct, but no costs. 14 Ves. 204.

(1) 1. The course to be pursued by one desirous of suing out a commission, is this : — 2. First, he must search whether a docket has been already struck ; and if it has not, then, — 3. Secondly, he must make affidavit, or, being a quaker, affirmation, of the truth and validity of his debt, and of his belief that the party against whom, &c. is a bankrupt. — 4. Which affidavit or affirmation must, if the creditor has a residence in London, be made before a master in chancery ; if he reside wholly in the country, then before a master extraordinary. Stat. 5. Geo. 2. c. 30. s. 23. 1 Mont. 69. — 5. Filing the affidavit in the secretary of bankrupt's office, and thereupon entering into the bond, is called striking a docket. 1 Mont. 72. — 6. The striking of a docket is justifiable only where there is a solid ground of belief of bankruptcy. 16 Ves. 167. — 7. The striking a docket is to prevent the bankrupt from wasting his effects before the commission issues. 1 Ves. jun. 157. 3 Ves. 349. — 8. A docket should not be struck solely to prevent the issuing of a commission upon the petition of another. 16 Ves. 145. — 9. And the practice of striking it to induce an arrangement, is an abuse, is discountenanced, and will not be aided. 6 Ves. 454. Ibid. 16 Ves. 150. 18 Ves. 298. — 10. Lord Erskine's general order of 29th Dec. 1806 (13 Ves. 207), too, is aimed against it. 16 Ves. 145. — 11. A commission sued out upon the petition of only one of two partners to whom a joint debt is due, is void. 1 Taunt. 477. — 12. And a debt owing to the creditor jointly with another person, who does not expressly concur in the petition, will not support a commission. 1 Camp. 474. 1 Taunt. 477. — 13. Where the petitioner's debt is one which accrued to his wife *dum sola*, she must be joined. 1 M. & S. 176. — 14. As she must be when it is a debt due to her *in auter droit*. 7 Vin. 66. 1 M. & S. 177. — 15. In the case of bankruptcy by lying in prison, the docket may be struck before the two months expire. 1 V. & B. 51. — 16. Though swearing the affidavit thus prematurely has been characterized as perjury. Ibid. — 17. No docket shall be struck but between ten in the morning and three in the afternoon, and between six and eight in the evening. Order, 13 April 1816. — 18. No docket is to be considered as struck until the same is entered in the docket-book. Orders of 29 Dec. 1806, and 13 April 1816. — 19. Affidavits are frequently made with improper precipitation. 6 Ves. 431. 14 Ves. 83. 15 Ves. 462. One partner may swear for all. 19 Ves. 291. — 20. The *validity* of the commission is not made dependent upon the swearing to the debt, required by stat. 5 Geo. 2. though its omission may afford a ground for the chancellor's interference. 2 N. R. 196. — 21. And the circumstance of the debts of three or more joint petitioners not appearing to amount to 200*l.*, does not invalidate the commission, however it may render it super-sedeable. Ibid. — 22. That part of the affidavit respecting the debt in general, not mentioning the particulars of the debt. 1 Atk. 153. 1 Ves. & Beam. 214. 2 Rose, 1—17. — 23. And affidavit as of the original debt is good, though judgment obtained thereon. 1 V. & B. 211. 1 Rose, 288. 2 M. & S. 123. 2 Rose, 8. — 24. And a deposition stating the debt to be due before and at the time of the issuing of the commission, is sufficient. 1 Stark, 458, n. — 25. It is useful, however, that the existence of the debt, at the time of the bankruptcy, should appear upon the deposition. 17. Ves. 415. — 26. That part of the affidavit which states that the deponent believes the person, against whom the docket is struck, is a bankrupt, is not required by any statute, but is a salutary practice. 14 Ves. 88. — 27. Any solicitor suing out a commission as agent only, is to indorse upon the affidavit his own name, and the name and place of residence of the person for whom he acts as agent in suing out such commission. Order of 5 Nov. 1793. — 28. The affidavit upon which the commission has issued, cannot be re-sworn to correct an error. 2 Rose, 369. — 29. See title Commission. — 30. If two or more persons apply at the same time to strike a docket against the same person, and both are prepared forthwith to issue a commission, it shall be determined by lot to whom the commission shall issue. If only one is prepared, it shall issue to him who is prepared. Order of 29 Dec. 1806. — 31. So if a solicitor receive upon Sunday instructions to strike a docket, and upon the Monday, before the office is open, he receive similar instructions from another client, he should draw lots, as if two applications

And by the st. 5 Ann. 22. no commission after 25 April 1707, shall be awarded on the petition of a single creditor, unless his debt amount to 100*l.* or upwards; or of two creditors, unless their debts amount to 150*l.*; or of three or more, unless their debts amount to 200*l.* or upwards. So by the st. 5 Geo. 24. (*m*)

And

were made at the same instant. 13 Ves. 197. — 52. There is an order that the striking a docket shall not prevent the issuing a commission upon the petition of another creditor, unless the party striking the docket seal his commission in four days, exclusive of the day of striking the docket; but a practice has prevailed contrary to the terms of the order; and it seems doubtful whether the court will interfere in any case of fair practice in opposition to this order. Order of 14 Feb. 1774. 6 Ves. 429. 1 Mont. 74. — 53. If two dockets are struck at different times against the same person, and commissions issue upon each, after attempts at an arrangement, under the docket first struck; and the first commission that issues is upon the docket last struck, such commission has been superseded. 6 Ves. 434. Ibid. 1 Mont. 74. — 54. If a solicitor has done every thing which by him ought to be done for the completion of the docket, and the officer omit to make the entry of the docket in the docket book, a subsequent docket has not the priority. 1 Mont. 73. — 55. See title Commission. — 56. If a petitioning creditor neglect to prosecute a commission within the limited time, he is not entitled to strike another docket without leave of the court. Order of 6 Dec. 1788; see 18 Ves. 298. — 57. If a docket is struck under one description, and another application is made with a different description of the same parties, it is the practice of the office to receive the latter description, and to suffer a second docket to be struck. 6 Ves. 434. Ibid. 1 Mont. 74. — 58. No holidays are to be kept at the office, except Christmas-day, Good-Friday, and days of General Thanksgiving, or Fast. Order of 13 April 1816. — 59. All solicitors of the Court of Chancery may, from ten in the morning to three in the afternoon, and from six to eight in the evening, have free access to the docket book, upon paying one shilling. Orders 29 Dec. 1806; and 13 April 1816. — 40. No additional or other fees above the usual and accustomed fees now payable for the transaction of the same business in office-hours shall be taken, received, or accepted for the transaction of any business out of the said office-hours, or upon any holiday. Order of 13 April 1816. — 41. The court will not suffer the person who strikes a docket to hold to the injury of the other creditors, any security or property which he obtains from the persons against whom the docket is struck. 15 Ves. 475.

(*m*) The doctrine relative to the petitioning creditor and his debt, may be treated thus:

First.—Of personal ability and disability to petition.

Secondly.—Of individuals who, from their relative situations, are and are not competent to petition.

Thirdly.—Of the sufficiency and insufficiency of debts in relation to their class or description.

Fourthly.—Of the amount of the debt.

Fifthly.—Of the sufficiency and insufficiency of debts in relation to the time at which they accrued.

Sixthly.—Of the sufficiency and insufficiency of debts quasi discharged.

Seventhly.—Of the sufficiency and insufficiency of debts barred by the statute of limitations.

Eighthly.—Of the sufficiency and insufficiency of debts merged by a defective award.

Ninthly.—Of the sufficiency and insufficiency of debts by award, pending a bill to set it aside.

Tenthly.—Of the sufficiency and insufficiency of debts forfeited by compounding with bankrupt.

And *First*.—Of personal ability and disability to petition.

1. A factor, though not *del credere*, selling in his own name, may petition, unless the principal has interfered. 4 Camp. 196. — 2. As may an executor before probate
1 Buck.

1 Buck, 255. 2 Mars. 425. 7 Taunt. 147. — 3. Though probate should be obtained before adjudication by the commissioners. 1 Buck, *supra*. — 4. So may one resident in a hostile country, for the fair purposes of a licence to export and import to and from. 1 Rose, 271. — 5. An infant cannot petition. 3 Ves. 554. — 6. And the disability of a co-creditor disables his companion. 3 B. & P. 113. 1 Camp. 482. 2 Rose, 174. 3 M. & S. 536. — 7. As where the co-creditor stands to this country in the relation of alien enemy. *Ibid.* — 8. Or where the debt is made up of demands due to several, of whom one is an infant. 1 Buck, 42. — 9. The sum due to testator's estate, for which the executor, having been ordered to pay it into court, is attached, is sufficient. Cooper, 198. — 10. As likewise is a bill drawn upon an infant, and accepted by him after coming of age. 4 Camp. 164. — 11. But the coming of age will not make a debt, contracted during infancy, sufficient. 2 Mont. note O.

Secondly—Of individuals who, from their relative situations, are and are not competent to petition.

1. An attorney who has not delivered his bill may petition; but after commission, taxation of the bill is of course. 1 Rose, 312. 16 Ves. 166. 11 Ves. 163. 1 Stark. 278. — 2. So, notwithstanding an order that it shall be taxed by a master, and all proceedings at law in the meantime. Mosley, 27. Vide Dougl. 195, n. 1 Esp. 449. Dougl. 199. 1 Stark. 278. — 3. An uncertificated bankrupt, unless his assignees claim the debt, may *comme semble*, petition. 2 Rose, 230. — 4. Order by Lord Thurlow that a petitioning creditor neglecting to prosecute one commission shall not have another. 18 Ves. 298. — 5. Proving a debt under an existing commission, does not at law preclude a petition upon an act prior to that upon which the existing commission issued; though it may induce the chancellor to interfere. 1 N.R. 265. — 6. A payment of the whole or part of the debt to a creditor, with knowledge of an act of bankruptcy, is void; so that the creditor may petition in respect of that debt for a commission upon such act of bankruptcy. 6 T. R. 79. — 7. A B. and C. cannot be petitioning creditors, in respect of a bill drawn by them, and accepted by the bankrupt, if it appears that A. engaged to provide for the acceptances when they should become due, although such engagement were made in fraud of his partners. 1 Stark. 102. — 8. A commission cannot be invalidated by proof of the requisites to support a previous commission, if the petitioning creditor had not any notice of the previous act of bankruptcy, when his debt was contracted. Stat. 46 G. 3. c. 135. s. 5. Vide Esp. 595. 3 Esp. 219. 9 East, 21. 14 Ves. 451. 15 Ves. 7. 2 M. & S. 127. — 9. A creditor is not prevented by st. 49 G. 3. c. 121. s. 14., from having proceeded at law. 1 Ves. & Beam, 215. 2 Rose, 8. accord. 2 M. & S. 123, leaves the point undecided. — 10. An executor may petition upon a debt due to his testator. 1 Atk. 100. 7 Vin. 66. — 11. But not the executor of a bankrupt. 1 Atk. 100. — 12. A joint creditor may petition for a separate commission. Willes, 467. 1 Cooke, 20. Davies, 460. 1 Atk. 133. 3 Ves. 239. 9 Ves. 35. 15 Ves. 499. 16 Ves. 195. Vide 1 V. & B. 65. 1 Buck, 11. — 13. A commission cannot be supported upon a debt due from one partner to another, arising out of a partnership, unless upon an account settled. 1 Mont. 21. — 14. *Secus*, if not arising out of the partnership. 1 Stark. 144. — 15. And where a deed was prepared, to refer to arbitration the accounts of a partnership, and all matters in difference between each partner, which was executed by part only of the firm; and an award of upwards of 100*l.* was made against one of the executing parties, who did not know that the other parties had not executed it; it was held not a good petitioning creditor's debt. 15 East, 209. Vide 17 Ves. 192. — 16. One, having received a dividend under a composition deed, executed after an act of bankruptcy of which he was ignorant, may petition. *Secus*, if the assignment be the act of bankruptcy relied on. 1 Stark. 262. 14 East, 197. — 17. But one who assents, and acts under a deed of assignment for benefit of creditors, though he does not execute, cannot petition upon that deed. 1 Mad. 598. — 18. Nor can a trustee, in a deed of assignment for benefit of creditors, petition. 1 Buck, 104.

Thirdly—Of the sufficiency and insufficiency of debts in relation to their class or description.

1. A debt upon an account, though not liquidated, will support a commission. 2 Ves. 327. 4 Ves. 168. Vide 1 Atk. 70. — 2. So will one arising out of a suretyship. Palm. 325. — 3. But an exchange of acceptances will not, unless the creditor has paid his own acceptance. 4 Taunt. 200. — 4. Nor will a debt in equity only. 1 P. Wms. 783. 2 Str. 899. 14 East, 204. 1 Atk. 147. 1 Mont. 21. n. (h) 1 Mont. 21, n. (i). Vide 2 Ves. 407. 1 Atk. 147. 11 Ves. 164. — 5. Hence the assignee of a bond cannot petition. 1 P. Wms. 783. 2 Strange, 899. 14 East, 204. — 6. Nor, as it seems, can a creditor by part payment for an equity of redemption, where the only remedy is by bill for specific performance, 1 Atk. 147.

Fourthly.

Fourthly—Of the amount of the debt.

1. The debt must amount, when the commission issues, if owing to one creditor or one firm, to 100*l.*; if to two creditors, 150*l.*; if to three or more to 200*l.* St. 5 G. 3. c. 30. — 2. And the purchaser of notes for 100*l.* for less than their amount, is, as it seems, a creditor for their amount. 1 P. Wms. 783. 1 Atk. 150. — 3. A commission sued by three or more, is not void at law, from the debt not appearing in the affidavit to amount to 200*l.*, however it may be supersedeable. 2 N. R. 200. — 4. *Quære*, whether a commission sued by three can be supported, from their failure to prove a debt of 200*l.* notwithstanding one proves a debt of 100*l.* 1 T. R. 475.

Fifthly—Of the sufficiency and insufficiency of debts in relation to the time at which they accrued.

1. The debt need not have been contracted, provided it existed during the trading. Palm. 325. 1 Vent. 5. 1 Ld. Rd. 286. 2 Str. 1211. 3 Wils. 13. 3 Wils. 262. Dougl. 295. Cowp. 540. 1 Mont. 26, n. (s.) Ibid. — 2. But payments, after retiring from trade, made upon a general account, must, notwithstanding a continuance of the dealings by the creditor, be applied to the old debt. 1 Ld. Raym. 286. Comb. 468. Peake, 64. — 3. A debt must have accrued to the petitioning creditor, before the party ceased to be a trader. Peake, 64. 12 Mod. 157. 1 Ld. Rd. 286, 7. Comb. 463. 1 Mont. 26. — 4. But if so contracted, it is sufficient, although it have since merged into a higher security. Peake, 64. Hardw. 267. 2 Str. 1042. See 1 H. B. 462. 2 M. & S. 123. 2 Rose, 4. 1 V. & B. 212. — 5. *Seemle*, that a warrant of attorney is *debitum in presenti*, sufficient to support a commission, though it appear by the defeazance to be given merely as a security against the running acceptances of the endorser. 4 Esp. 194. — 6. Creditors by personal securities, payable at a future day, may petition. By st. 5 G. 2. c. 30. — 7. And if at the time of petitioning, the debt be of the requisite amount, it is sufficient. 13 East, 213. — 8. Which security need not be for a debt contracted in trade. 2 Str. 1211. 3 Wils. 13. 3 Wils. 262. Cowp. 540. — 9. But a debt upon a verbal contract payable at a future day, is insufficient. Cooke, 23. Peake, 54. 9 East, 499. Ibid. 1 Camp. 335. 3 V. & B. 129. 1 Camp. 189. 1 Buck, 35. — 10. Hence, a sale of goods upon an unexpired credit does not constitute a sufficient debt. 6 Esp. 55. 9 East, 498, 500, over-ruling. Peake, 54.; and see 4 East, 438. 1 Smith, 281. 4 Taunt. 200. 3 V. & B. 130. — 11. If goods are sold at six or nine months credit, and the purchaser says, "six or nine months will do for me," a commission cannot issue between the sixth and the ninth month. 5 Taunt. 338. — 12. So a person who sells goods, to be paid for by a bill at four months, cannot sue out a commission of bankrupt until such bill has been given, or the four months are fully expired. 1 Camp. 335. — 13. Hence, too, a debt payable *in futuro* by the custom of trade, is insufficient. 1 Mad. 72. Ibid. Vide 1 Buck. 35. — 14. It seems doubtful whether a commission can be supported against any party but the acceptor, before the bill is dishonoured. 4 Camp. 245. 6 T. R. 59. Vide *infra*, (d). — 15. A bill or note due before *, but indorsed since the bankruptcy, is sufficient. 1 P. Wms. 783. Cooke, 21. 1 Atk. 75. Wils. 135. Cooke, 19. Vide 7 T. R. 498. 13 East, 217. 1 Rose, 20. 2 Str. 949. — 16. A. purchases coals of B. and agrees to give him a bill of exchange for part of the purchase money, payable at two months. Afterwards A. sends to B. a paper, purporting to be a bill accepted by him, with a blank left for the name of B. as the drawer; B. keeps the paper, but does not fill up the blank till after he had sued out a commission against A. Held, that the bill did not constitute a valid petitioning creditor's debt; and that B. having elected to keep the bill, could not prove his debt as petitioning creditor, for goods sold and delivered. 1 Buck, 54. — 17. A judgment for damages in a suit *ex contractu*, is insufficient by relation to the verdict. 14 East, 197. 16 Ves. 256. — 18. If the trustees under a marriage settlement transfer stock, with the privy of the husband, into the name of the wife, and the wife afterwards sell out the stock, and permit her husband to receive the proceeds, it seems that the trustees may be petitioning creditors in a commission against the husband, from the time of the sale by the wife, and receipt of the proceeds by the husband; but not from the time of their transfer to the wife. 1 Mont. 21. — 19. A creditor by simple contract may petition, notwithstanding acceptance of a bond after a secret act of bankruptcy. 2 Str. 1043. Annaly, 267. Peake, 64. B. & P. 582. 1 V. & B. 212. 1 Rose, 288. 2 M. & S. 123. 2 Rose, 4.; see Dallas's American Reports, 380. — 20. Notwithstanding the st. 46 G. 3. c. 135. the debt must have existed at the period of the act of bankruptcy. 1 Camp. 489. See 14 Ves. 80. 83. 1 N. R. 263. — 21. Even previous to the statute it was sufficient if the debt vested before the commission was sued out. Cooke, 24. —

* Which circumstance seems to be immaterial. 1 Mont. 28. n. (l).

And before the commission granted, the creditors petitioning shall give bond to the lord chancellor, &c. of 200*l.* penalty, on condition, that they prove (n) their debts, and the party a bankrupt; and on failure,

22. A debt contracted after the arrest, and before the expiration of the two months, is not sufficient. 1 Mont. 26. n. (a). Whitm. 22. — 23. But commission supported upon a debt, for which judgment was obtained pending the two months imprisonment. 1 V. & B. 211.

Sixthly—Of the sufficiency and insufficiency of debts quasi discharged.

1. On the dishonour of an accommodation bill taken in payment, the original debt revives; nor is notice of dishonour requisite. 1 T. R. 405. — 2. If a debtor for goods sold give a bill for his debt, which the creditor discounts, and upon its being dishonoured when due after the bankruptcy, he pay it, he may issue a commission upon the debt for the goods. 1 Mont. 27. — 3. But an execution against the person discharges the debt. 1 Str. 653. 1 Atk. 141. 8 T. R. 125. 1 B. & P. 302. 1 T. R. 557. Ibid. See Cullen, 70. 4 Esp. 194. — 4. Though the proceeding under a judgment, not against the person, has no influence. 4 Esp. 194.

Seventhly—Of the sufficiency and insufficiency of debts barred by the statute of limitations.

1. A debt barred by the statute of limitations, will support a commission against third persons; but the bankrupt, it seems, may supersede it, unless he waive the objection by submitting to the commission, or by any other acknowledgment of the debt. 2 Str. 974. contra, Mosely, 37. 5 Burr. 2628. Cooke, 11. 1 T. R. 405. 15 Ves. 491. — 2. If, however, a commission issue upon a debt barred by the statute of limitations, and the person against whom it issues does not submit to it, or if he submit no farther than he is compelled, or if he waive the objection; a creditor may, as it seems, avail himself of the objection, with a view to take out another commission upon another debt. 15 Ves. 494.

Eighthly—Of the sufficiency and insufficiency of debts merged by a defective award.

If a debtor submit to arbitration all matters in difference between him and a creditor; and under this arbitration an award is made which is in force, though upon its face the award is bad, it seems the creditor cannot issue a commission upon the original debt, when after issuing it, the award is made a rule of court, and no application made to set the award aside. 1 Mont. 24.

Ninthly—Of the sufficiency and insufficiency of debts by award, pending a bill to set it aside.

A bill to set aside an award upon which the debt arises, has no influence. 1 Atk. 240.

Tenthly—Of the sufficiency and insufficiency of debts forfeited by compounding with bankrupt.

The commission seems to be supersedeable only, not invalidated, by the petitioning creditor compounding with the bankrupt. 4 Esp. 104.

(n) The doctrine respecting the proof of petitioning creditor's debt, may be treated with reference to proceedings, *First*, before the commissioners: *Secondly*, on other occasions; and *First*, with reference to proceedings before the commissioners:—1. He need not prove a debt similar in its nature or amount to that upon which he strikes the docket. 1 V. & B. 215.—2. The proof may, under circumstances, be by affidavit. 1 Buck. 47.—3. One partner may prove for all. 19 Ves. 291.—4. The proof must be at a public meeting. 2 V. & B. 374. Queried by Mr. Montague, 1 vol. 72. n. (o).—*Secondly*, with reference to proceedings on other occasions.—1. An entry in a trader's book, made some months before an act of bankruptcy, is *prima facie* evidence of a debt subsisting at the time of the bankruptcy. 2 Camp. 49. Ilardw. 378.—2. So a promissory note bearing date before the bankruptcy, is *prima facie* evidence of a debt precedent to bankruptcy. But no letter or declaration of the bankrupt, after the bankruptcy, is admissible in confirmation of the date. 1 Stark. 177.—3. When the debt is upon a bill of exchange, and the commission is against the drawer, there must be evidence that it was indorsed to the petitioning creditor, before the commission issued. 4 Camp. 245. 6 T. R. 59.—4. Therefore, where the debt is a bill drawn

failure, the bond shall be assigned for the benefit of the party grieved. (o)
So by the st. 5 Geo. 24. (p)

The

drawn by the bankrupt in favour of A., and indorsed to the petitioning creditor, it must be shewn to have been so indorsed before the suing out of the commission. 4 Camp. 245. — 5. If the debt be proved to have once existed, its continuance will be presumed. 2 Camp. 50. — 6. Semble, that upon a sale of goods for present bill, the jury may in some cases presume, that a bill has in fact been given. 6 Esp. 55. 9 East, 498. — 7. If, after the death of a testator, his business is carried on, and a debt contracted, and the debtor acknowledge that he is indebted 100*l.* to the executors: this is not sufficient evidence of a debt to all the executors, without shewing that they all assented to carrying on his trade. 1 Stark. 213. — 8. The petitioning creditor's debt is sufficiently proved by entries in the bankrupt's books, posted by himself before the act of bankruptcy. 1 Camp. 376. — 9. But an account signed by a bankrupt, is not evidence of his petitioning creditor's debt, without extrinsic evidence that he signed it before his bankruptcy. 4 Taunt. 560. — 10. An acknowledgment by the bankrupt, made upon the day the act of bankruptcy was committed, or at any time before the issuing of the commission, is sufficient evidence of the petitioning creditor's debt. 1 Esp. 168. And see 13 East, 213. 214. 2 H. B. 279. — 11. Unless upon an attested instrument, when the subscribing witness must be called. Dougl. 216. 5 T. R. 306. — 12. In an action by the bankrupt against the petitioning creditor, to try the validity of the commission, proof that the bankrupt and the petitioning creditor attended the second meeting of the commissioners, and discussed before them the debt due to the petitioning creditor, and produced their accounts; and that the bankrupt objected to part of the petitioning creditor's account, and the commissioners ticked off such items in it as they allowed, and struck a balance of 169*l.*, was held evidence for the jury to imply an admission by the bankrupt, from his own conduct and demeanour before the commissioners, that such a balance was due, but not of an adjudication by them by their own authority as commissioners, or of an award made by them as arbitrators. 2 M. & S. 265. — 13. The assignees must prove the petitioning creditor's debt, by the same evidence which must have been produced in an action against the bankrupt. B. N. P. 37. Dougl. 216. — 14. Where in an action by assignees, the defendant gave no notice under stat. 49 Geo. 3. c. 121. s. 10. of his intention to dispute the petitioning creditor's debt, the debt is sufficiently proved by the deposition of the petitioning creditor himself, appearing upon the face of the proceedings; though if such notice had been given, he would not have been a competent witness to support the commission *viâ voce*. 2 Camp. 493. — 15. An admission made by a petitioning creditor of the nature of the claim upon which he has in fact sued out a commission, may be given in evidence for the purpose of invalidating the commission in a collateral action. 6 Esp. 121. — 16. And in an action against the sheriff, who is indemnified by the assignees, declarations by the petitioning creditor that his debt is less than 100*l.*, is admissible. 4 Camp. 38.

(o) 1. The bond must be given by the petitioning creditor. 3 Ves. 554. — 2. Hence it cannot be given by the solicitor to a commission issued by an infant. 3 Ves. 554. — 3. When a husband and his wife are petitioning creditors, the bond must be given by the husband. 1 M. & S. 176. — 4. One partner may execute the bond for all. Cooper 99. 2 Rose, 172. 19 Ves. 291. See 2 Rose, 174. — 5. The assignment is restricted to the case of malice. 11 Ves. 415. — 6. And was refused in a case of strong suspicion only. *Ibid.* — 7. A creditor aggrieved by the issuing of a fraudulent commission, is not entitled to an assignment. 2 Mad. 1, *accord*. 3 East, 22, *contra*. — 8. The assignee must elect between the bond and an action upon the case. Swanst. 20. — 9. The assignees of the bond is entitled, under a general assignment, to recover the whole penalty. 7 T. R. 300. 3 East, 23. — 10. And where the chancellor directed that a sum received by the petitioning creditor of the bankrupt be refunded to an assignee under a second commission, and further ordered, that the bond be assigned to such assignee; held that the assignment of the bond could not be considered merely to enforce payment of the sum to be refunded. 3 East, 23. — 11. Where the commission is superseded, and the petitioning creditor's conduct, though improper, is not such as will justify an assignment, the bond will be ordered to stand as a security for the costs. 14 Ves. 600. — 12. The assignment is *conclusive* of malice. Swanst. 23. 11 Ves. 415. 7 T. R. 301.

(p) These are miscellaneous points relative to the rights, duties, and liabilities of the petitioning creditor:—1. The petitioning creditor is pledged to the validity of the commission, and to every act that is necessary for its preservation. 2 Rose, 180. 386. — 2. He

The commission ought to be granted *de jure*, upon the petition of creditors, &c. 2 Ca. Cha. 191. 1 Ver. 153. (q)

But

—2. He should be assistant to the commission in all its stages. 2 Rose, 386.—3. Grounds of Lord Rosslyn's general order of 26 Nov. 1798, that the petitioning creditor shall attend in person at the opening of the commission. 17 Ves. 415.—4. His attendance, however, may, under circumstances, be dispensed with. 8 Ves. 318.—5. He must furnish the assignees with the necessary evidence to support the commission. 2 Rose, 138. 386.—6. And hence is responsible for the production of a bill of exchange, upon the direct proof of which his debt was established. 2 Rose, 386.—7. Until the choice of assignees, the petitioning creditor must prosecute the commission at his own expence, which expence is reimbursed out of the first monies or effects received by the assignees. Stat. 5 Geo. 2. c. 30. s. 25.—8. And as by this statute he is made solely liable to the payment of the expences; when therefore he is appointed co-assignee, an action for these expences will not lie against all the assignees jointly. 2 Camp. 275.—9. The general rule is, that the petitioning creditor, and not the solicitor he employed, is liable to the messenger under the commission for his fees; it being known that the solicitor acts not as a principal but as an agent only, and the messenger having the means of ascertaining who the petitioning creditor is. 2 M. & S. 438. Holt. 576.—10. An exception to this rule happens, where the solicitor agrees with the petitioning creditor to work the petition for a gross sum; when having received sufficient to cover the messenger's demand, he is liable to him as for money had and received. 2 M. & S. 438.—11. He is also only liable to the messenger for necessary expences, except by special contract. 1 Stark. 363.—12. Therefore costs of messenger's journey to the Isle of Man, are not recoverable against petitioning creditor, without a special contract. 1 Stark. 363.—13. Expences of a previous separate, superseded for a joint, commission, are to be paid, and out of the joint estate. 2 Rose, 26.—14. Though petitioner had notice that a docket was struck against all the members of the firm. 1 V. & B. 61. 1 Rose, 434.—15. Unless it was issued against good faith. 1 V. & B. 61. 1 Rose, 423. 434.—16. On his declaring his own commission to be invalid, he was made liable for the costs of inquiries occasioned thereby. 2 Rose, 386.—17. Upon suspicion of collusion between bankrupt and petitioning creditor, to invalidate the commission, the bill of exchange upon which it issued will be ordered to be deposited with the secretary of bankrupts, not to be produced except for some legal purpose.—18. If between the time of striking the docket, and the time of sealing the commission, the creditor receives from a surety such part of his demand as to reduce it below 100%, the commission cannot be supported. 1 Mont. 29.—19. But composition after a docket struck, not followed by a commission, is not within the statute. 15 Ves. 472. Vide 3 Ves. 349. 15 Ves. 462.—20. The debt is forfeited as well under a commission founded upon any other act of bankruptcy, as upon that particular species created by this statute. Cox, 61.—21. And the whole, though the composition extends to part only. Cox, 61.—22. The knowledge of two or three creditors, will not save a forfeiture. 15 Ves. 461. 1 Buck, 108.

(q) 1. The commission must, under the general order of the 29th December, 1806, be sealed at the first public seal, though within the seven days. 19 Ves. 61. 1 Rose, 355.—2. It may be sealed in the night to prevent an extent. 14 Ves. 87.—3. The commission is to be accounted sealed from the delivery only. 1 V. & B. 39.—4. And is inoperative before delivery. 1 Rose, 380. 1 V. & B. 39.—5. But delivery to a messenger is in effect to the party. 1 Rose, 380. 1 V. & B. 39.—6. The bankrupt may be called in the commission by the name himself has used. 2 Rose, 25 Sed vide 2 Rose, 246.—7. Or by the name he once went by, though since disused. 5 Camp. 256.—8. The variation of a letter in his name is fatal. 1 Rose, 314. 2 Rose, 246.—9. Unless the altered name is *idem sonans*. 2 Rose, 20. Sed vide supra.—10. Order for a commission, with an alias in an urgent case. 19 Ves. 277. (the names, however, were *id. son.*)—11. He may be described as he is well known. 2 Mad. 11.—12. "Dealer and chapman" is a sufficient description. 2 V. & B. 400. or "waterman." 2 V. & B. 399. supported as they are by the general statement of gaining his livelihood by buying and selling. Vide 2 Mad. 13. n. Ibid.—13. His place of residence should be correctly described. 1 Mont. 78.—14. To support a joint commission, each member of the firm must become, and be declared, bankrupt. 1 Atk. 97. 1 Cooke, 7.—15. For, if a number less than the whole become, or are meant to be made, bankrupt, separate commissions against each individual proposed,

are requisite. 3 T. R. 779. — 16. Hence a joint commission against a firm of two partners, of whom one is an infant, 4 Ves. 163. 6 Ves. 440. or resides abroad. 6 Ves. 434, is improper. — 17. The death of one of the firm after a joint commission taken out, is no objection to its proceeding. Forr. 184. 1 Vern. 154. — 18. But a commission against two, of whom one is dead, is a nullity. Ibid. — 19. Arrangements were made in a case of several commissions (joint and separate) upon the bankruptcy of several firms also united. 1 V. & B. 160. — 20. A commission against A., described as a partner with B., is separate. Cox, 308. — 21. Now the joint commission alone stands, and is made subservient to the purposes of the separate. 2 Ves. jun. 69. 15 Ves. 115. — 22. Where there are co-existing commissions, that will be supported which is the most convenient. Ex parte Layton, 6 Ves. 434. — 23. A docket struck, but no commission issued thereon, shall not prevent a commission by another creditor, applying in not less than four days. By order of 12 Feb. 1774. — 24. Query, if this order can be strictly acted up to; the practice opposing it, and there being danger of fraud. 6 Ves. 429. — 25. See as to the practice where the fourth day after docket struck is a holiday. 12 Ves. 418. — 26. Commission to be executed in London, supersedeable for want of prosecution, after fourteen days; country, after twenty-eight days, from its date. Order of 26th June 1793. — 27. And the practice is invariable to supersede upon the 30th day, upon an application made the 29th, unless previous notice upon the 29th, of the adjudication. 2 Rose, 190. — 28. Proof of the act of bankruptcy warranting adjudication; a sufficient proceeding within the order. 1 V. & B. 78. — 29. And notice that first commission is to be proceeded in, prevents second. 1 Rose, 85. — 30. Necessity, or circumstances, are an implied exception to the order. 7 Ves. 135. 1 Rose, 380. 1 V. & B. 34. 3 Rose, 319. — 31. But the strongest proof of their existence is requisite. 1 V. & B. 43. 1 Rose, 380. — 32. The case where through some misunderstanding the fees were not left, and the directions given not complied with. 1 Rose, 162. — 33. The case where this happened through mistake of solicitor's clerk. 1 Buck, 1. — 34. The case where through neglect of the bankrupt office clerk, the entry was not made. 2 Rose, 325. — 35. The commission is not superseded till the *supersedeas* issues. 6 Ves. 429. — 36. And second commission is not of right, so that first, even though superseded, may revive. 1 Rose, 380. — 37. The first cannot be superseded without petition, and the writ issuing; a note of what has passed under the first, must be sent to the chancellor; affidavit that adjudication within the time does not appear from the Gazette, is sufficient presumptive evidence. 1 V. & B. 34, 42. — 38. After a commission sealed, three commissioners are to be summoned, by a messenger, to open it. These, upon meeting, reciprocally qualify each other, by alternately administering the oath prescribed; and then proceed to examine the proof of petitioning creditor's debt. — 39. The commission ordered to be opened after delay, the delay arising from the bankrupt. 3 V. & B. 174. — 40. Neither the plaintiff's nor defendant's bankruptcy, pending a suit at law, abates it. 2 Wils. 372. Vent. 193. 5 Mod. 38. 2 Wils. 538. 1 T. R. 465. 2 T. R. 45. 3 T. R. 437. 2 Anst. 977. 18 Ves. 426. — 41. Hence, if it happens before judgment, the suit must proceed to judgment in the bankrupt's name. 1 T. R. 463. 15 East, 622. — 42. And in the case of plaintiff's bankruptcy between interlocutory and final judgment, final judgment may be entered and execution sued, either in his name, or there having been no proceeding by bankrupt upon the interlocutory judgment, 1 T. R. 463. 15 East, 622. (preceded by a *scire facias*) in the names of his assignees. 2 Wils. 358. 3 T. R. 437. — 43. And should assignees, after declaration, commence a new action, and arrest defendant (which, being before interlocutory judgment, is regular, Tidd's Pract. 185.) court will not discharge his bail in the first. 15 East, 622. — 44. The plaintiff's bankruptcy pending a suit in equity, does not abate it. 1 Atk. 263. 1 Dick. 348. Cooke, 545. 2 Anst. 460. n. 1 Atk. 263. Ibid. 4 Ves. 387. accord. 2 Anst. 458. n. 1 Atk. 263. n. *contra*. — 45. And an order for dissolving an injunction *nisi* will, unless cause be made absolute, notwithstanding plaintiff's bankruptcy. 1 Atk. 263. — 46. But chancery and exchequer practice differ, in that by the former the suit becomes defective, and assignees must be made parties by bill, or supplemental bill in nature of revivor; or bill will be dismissed. 4 Ves. 387. and with costs. 18 Ves. 426. — 47. Though in a case of small value, money ordered by decree to plaintiff, was, upon his bankruptcy, paid out to assignees on their and his joint petition. 2 Bro. 322. — 48. Bankruptcy of defendant is no abatement. 2 Anst. 458. — 49. And plaintiff, therefore, cannot dismiss his bill without costs. 2 Anst. 458. — 50. A decree for a receiver is not superseded by a commission. 3 Atk. 564. — 51. An executorship, with which a bankrupt happens to be invested, is untouched by his bankruptcy. 1 Atk. 101. — 52. Equity will not interfere to restrain the bankrupt from recovering his property, when the commission is not proceeded in. Cox, 24. — 53. A commission distinguished from, or assimilated to, an execution. See 1 Vern. 153. 1 Atk. 67. 153. 2 Ves. 68.

But a commission, granted (*r*) before an act of bankruptcy is completed, will be void: as, after an arrest and imprisonment, and within two months after the arrest. 1 Sal. 111. (*s*)

By the st. 21 Jac. 19. no purchaser shall be impeached, &c. unless a commission be sued within five years after he becomes bankrupt. Vide post, (D 18.)

And therefore, the commission ought to be granted within five years after the act of bankruptcy. Semb. 1 Lev. 19. 1 Ver. 153.

But if there are several acts of bankruptcy, it may be granted within five years of the last act. R. 1 Lev. 13.

So it must be granted during the life of the bankrupt, and not afterwards. 2 Ca. Ch. 143. 192. 1 Ver. 153.

So by the st. 7 Geo. 31. a creditor on a security not due before the party becomes a bankrupt, shall not be a sufficient creditor in respect of such debt, to join in a petition for a commission of bankruptcy, until such time as his debt becomes actually due and payable.

(D 2.) Who shall take advantage of the commission.

By the st. 1 Jac. 15. in four months after the commission, and until distribution, &c. any creditors of the bankrupt may join with the creditors who sued forth the commission, those so coming in contributing (*t*) to the charges of the said commission, and if the creditors come not in within four months, then the commissioners have power to distribute.

And all the creditors may come in before (*u*) distribution made, though four months are passed. R. Hutt. 38.

So by the st. 7 Geo. 31. a creditor, whose bond, bill, note, &c. taken on sale of goods, is payable at a future day.

And till the four months are passed the commissioners cannot make distribution, though they may sell and prepare for a distribution presently upon execution of the commission, within the four months. R. Hutt. 37.

3 Ves. 239. 15 Ves. 494. 17 Ves. 251. 408. 1 V. & B. 66. 3 V. & B. 107. 15 East, 230. — 54. A mistake may be corrected before the commission has been acted upon. 10 Ves. 286. — 55. But not afterwards. 10 Ves. 286. 13 Ves. 325. — 56. Even to correct a clerical error, 190. — 57. Alteration in the description of a bankrupt, refused. 9 Ves. 207. — 58. To correct a wrong christian name, a new docket, bond, and re-swearing of the affidavit, ordered. 1 Rose, 85. 18 Ves. 480. — 59. Alteration of the teste, and re-sealing of commission acted upon, to let in a subsequent act of bankruptcy, refused. 1 Rose, 228. 18 Ves. 480.

(*r*) 1. If the act of bankruptcy is complete before the commission is sealed, though subsequent to the docket, it seems sufficient. 14 Ves. 80. 1 Ves. J. 51. — 2. At least a commission may be supported upon an act of bankruptcy, by lying two months in prison, upon a docket struck before the two months expire. 1 Ves. J. 51.

(*s*) Nor is the commission rendered valid by the party's continuing in prison during the remainder of the two months. 4 Esp. 221. 8 T. R. 507. Sed vide Bea. L. M. 498. 2 Show. 509. 512. 14 Ves. 80. 83.

(*t*) Creditors may prove without paying contribution. Stat. 5 Geo. 2. c. 30. s. 25.

(*u*) If a creditor make oath of a certain sum being due to him, he ought to be admitted to prove to that amount for the purpose of choosing assignees, for the account may afterwards be fully investigated; unless there appear to the commissioners to be any reasonable objection to the fairness of the debt, and then the commissioners must only suffer the creditor to claim, till he makes out his demand to their satisfaction. 1 Atk. 70.

And it is sufficient that the creditors offer to be joined and contributory to the charge, without tendering any particular sum. Hutt. 38.

So, after a distribution of part, any creditor paying contribution may come in for that which remains. R. 2 Ca. Ch. 154.

But an offer of creditors to join with those that procured the commission, is not sufficient, without an offer also to be contributory to the charges. R. Hutt. 38.

And the charges comprehend all expences of the execution and defence of the commission, as well as of the issuing. Hutt. 38.

And if the creditors refuse, or neglect to come in before distribution made after four months, they shall not be afterwards aided. R. 2 Co. 26. b.

And if distribution be made after the four months of part only, the other creditors come too late. R. Hutt. 38. R. cont. that they do not come too late for the residue. 2 Ca. Ch. 154. (x)

And they ought to take notice of the commission, it being of record. 2 Co. 26. b.

(D 3.) Who are creditors.

By the st. 21 Jac. 19. (though not by the st. 13 El. 7. and 1 Jac. 15.) alien creditors shall have the same benefit of a commission of bankrupt, as a subject or denizen.

And by the same statute, every creditor (y), having security for his debt by

(x) 1. Proof, after dividend, will be admitted, and satisfied before a farther dividend, if the delay is accounted for. 1 Sch. & Lef. 242. 1 Mad. 600. 1 Atk. 208. 2 Bro. 50. — 2. It seems that the regular mode of being admitted to receive former dividends, is by petition to the Lord Chancellor. But if the assignees pay former dividends without an order, to any creditors who have omitted to prove until after a dividend, they must pay all such creditors in the same manner. 2 Bro. 50. — 3. It was formerly considered, that after distribution actually made of any part of a bankrupt's estate, creditors could not be admitted to prove their debts, unless under particular circumstances. Hob. 287. Hutt. 38. Good. 43. — 4. But since the alterations made by later statutes, as to the time and manner of making a dividend, except where there has been gross laches, a creditor will be permitted to prove his debt at any time, as long as any thing remains to be divided. 1 Atk. 208. — 5. Where a landlord distrained for rent, and fifteen years after the date of the commission, when the assignees and bankrupt were dead, applied to be admitted to prove a debt, which depended upon an account said to be settled between him and the bankrupt; the Lord Chancellor, in consideration of the length of time, and circumstances of the case, dismissed the petition. 1 Atk. 111. — 6. It is the practice without an order, to permit creditors to prove at a meeting to declare a dividend, and in the first place to direct them to be paid equal to those who had proved before, and then to direct a general distribution of the residue. Co. Bt. Laws, 521.

(y) 1. Though surety had become liable before, yet if he had not paid till after the principal's bankruptcy, he could not have proved. Barnes, 113. 3 Wils. 262. Blk. 794. Cowp. 525. 1 T. R. 599. 7 T. R. 364. 1 Bro. 384. 3 Wils. 13. Blk. 839. 3 Wils. 546. 3 Wils. 528. Dougl. 166. 1 Atk. 130. 1 H. Bl. 640. 4 T. R. 714. 4 M. & S. 533. — 2. Unless the surety had taken from the principal a counter security, payable absolutely at a day certain. Cooke, 157. 2 H. Bl. 570. Cooke, 158. 2 T. R. 100. Id. 640. 7 T. R. 97. — 3. Which right of the surety to prove upon his counter security, was subsequently confined to where the surety applying to prove had taken up his own bills, or paid the original debt, if upon bond, so that the bankrupt's estate should at all events be exonerated from the original debt. Co. Bt. Laws, 149. 161. and see 4 Ves. 385. — 4. And where the counter security was conditional, and not forfeited before the bankruptcy, he could not have proved at all. 2 T. R. 640.

2 Str. 1160. — 5. *Secus*, had it been forfeited. 3 Bro. 502. 7 T. R. 97. — 6. But now, sureties for bankrupt paying debt after commission issued, may prove under it, or if the creditor has proved, they may stand in his place. Stat. 49 Geo. 3. c. 121. s. 8. — 7. The surety as well as principal in the grant of an annuity, is within the 49th Geo. 3. c. 121. s. 17. 4 Taunt. 90. But see 4 M. & S. 333. — 8. When the creditor had proved under the commission before he called upon the surety, the surety had an equitable right to stand in the place of the original creditor, and receive dividends upon such proof. 2 P. Wms. 89. 1 Atk. 129. 6 Ves. 285. Co. Bt. Laws, 210. — 9. And upon a bill filed by a surety in a bond against the obligee, to compel him to prove under the commission against the obligor; the court ordered the defendant to prove, upon the plaintiff's bringing the money into court. Co. Bt. Laws, 211. — 10. And where the holder of a bill proved it under a commission against the person who ultimately ought to have paid it, before he called upon the surety, and he received either the whole, or a part of the debt from the surety; the court gave the surety the benefit of the holder's proof under the commission. 2 P. Wms. 89. 1 Atk. 129. 6 Ves. 285. Co. Bt. Laws, 210. — 11. But this equity of the surety to stand in the place of the holder of the bill, will not be permitted to operate to the prejudice of such creditor, if he has any other distinct demand upon the bankrupt's estate; and therefore any diminution of his dividends upon such distinct debt, occasioned by the surety's standing in his place, and receiving dividends upon such first-mentioned debt, must be made good to him by the surety out of such dividends. 3 Ves. 243. — 12. Proof by the creditor on behalf of the surety allowed, surety having paid. 6 Ves. 646. — 13. Proof by the creditor on behalf of the surety, having paid, may be compelled. 10 Ves. 414. — 14. But a person liable with others upon a bill of exchange, cannot raise that equity by payment subsequent to the proof of the holder, until he has received 20s. in the pound. 10 Ves. 414. but now vide supra. — 15. The debt of a surety, payable after the issuing of a commission against him, may, by virtue of stat. 7 Geo. 1. c. 31. be proved under it. He will therefore be discharged from the debt by his certificate. 1 T. R. 17. — 16. A. in consideration of 11. 10s. 7d. received of B., undertakes in writing to make himself liable for the due payment of a note upon which C. was then indebted to B., and B. thereupon consents to furnish C. with more goods; and then A., before the note was due, becomes bankrupt. Held, that A.'s undertaking was intended as a collateral engagement only, in case C. should not pay the note when due; and therefore was not proveable. Cowp. 460. — 17. Debt accrued by default, after bankruptcy of surety, is not proveable. 15 Ves. 286. — 18. Hence, where a bond conditioned for the repayment of money by a principal and surety, has not been forfeited till after the bankruptcy of the surety, the debt cannot be proved. Dougl. 160. — 19. Proof by acceptor of accommodation bill as a party liable, within stat. 49 Geo. 3. c. 121. Rose, 40. — 20. Proof by drawer of bill as a party liable, within stat. 49 Geo. 3. c. 121., from being first liable by the real nature of the transaction. 3 V. & B. 40. — 21. Proof by a partner as a party liable, within stat. 49 Geo. 3. c. 121. 3 V. & B. 31. — 22. A. and B. are partners, they agree to dissolve partnership, and B. covenants to indemnify A. against all demands owing from the partnership. B. becomes bankrupt. A. is obliged to pay a debt owing from the partnership; but he may, if he pleases, come in under B.'s commission. Clearly as the law stood before stat. 49 Geo. 3. c. 121. s. 8. B.'s certificate would not have barred A.'s claim, since the payment by him having been made after the bankruptcy, he could not have proved under the commission; but that statute has provided, that "where, at the time of issuing the commission, any person shall be surety for, or be liable for any debt of the bankrupt, it shall be lawful for such person, if he shall have paid the debt, although he may have paid it after the commission shall have issued, to prove his demand in respect of such payment, as a debt under the commission; and every person obtaining his certificate shall be discharged of all demands at the suit of such person." &c. &c. Held, that B. is discharged under the statute, for either, 1. The statute contemplates equitable as well as legal liability; if so, then A. was surety for B., since, though at law A. was liable as well as B., yet in equity B. was liable alone, and A. was surety for him. 2. Or, the words "liable for any debt of the bankrupt," are large enough to comprehend this case. 2 M. & S. 195. 2 Rose, 47. — 23. A bail-bond to the sheriff, forfeited before the bankruptcy, is proveable. 1 Cowp. 25. — 24. *Secus*, if not forfeited, until after the bankruptcy. 1 Burr. 436. — 25. A. becomes bail for B.; A. cannot prove as a creditor under a commission of bankrupt against B., till A. has actually paid the debt; and if B.'s act of bankruptcy be prior of A.'s paying the debt, he cannot prove at all. 3 Wils. 262. 2 Blk. 794. — 26. Debt and costs on bail-bond (though increased by two writs of error) paid for a bankrupt on a promise of indemnity, are not covered by the commission of bankrupt, the same not being paid till after the bankruptcy, though judgment on the bail-bond was had before. 2 Blk. 794; 3 Wils. 262.

by judgment, statute, recognizance, specialty, &c. whereof no execution or extent is served, and executed before (z) such time as he became bankrupt, shall be relieved, &c.

And every creditor having security for his debt, or having no security, &c. or having made attachment of the goods of the bankrupt by the custom of London, or elsewhere. (a)

If

— 27. Bail are not to be considered as sureties for, or as liable for the debt of a bankrupt, within 49 Geo. 3. c. 121. s. 8. 2 Mars. 192. 6 Taunt. 329. — 28. The assignee of a judgment creditor may prove under stat. 49 Geo. 3. c. 121. the credit arising from payment since the bankruptcy, of bills accepted for bankrupt's accommodation. 1 Rose, 4. 7 Ves. 245.

(2) 1 P. Wms. 91. 737.

(a) 1. Proof allowed only for the debt itself, upon the bankrupt's own security. 6 Ves. 449. 600., and sec 15 Ves. 472. — 2. On proof by creditor holding security, the security is never deducted, unless it be upon the bankrupt's property. 1 Rose, 76. 18 Ves. 65. — 3. Rule that security shall be sold before proof, will be cautiously relaxed; and, in this respect, the general benefit of creditors, and amount of the debt, are material circumstances. 2 Rose, 63. 1 V. & B. 518. — 4. Proof allowed, without delivering up assignment of premises by third persons as sureties. 3 Mad. 373. — 5. Proof allowable to full amount of third person's security, though it exceeds the debt, so as only 20s. in the pound is received. 6 Ves. 449. 600. — 6. Proof allowable to full amount of each of several securities by third persons. 18 Ves. 65. — 7. Creditor's proof upon retaining property, not to be refused because thereby enabled to elect himself assignee; if he does so, he will be removed, upon a prompt application. 1 Rose, 324. — 8. If a security is deposited by a debtor generally to indemnify his creditor for a balance then due, and for such sums of money as shall be advanced to him, and at the time of the bankruptcy of the debtor, the creditor has two demands, the one proveable under the commission, and the other not; he may apply his security in the first place, to reduce that demand which is not proveable under the commission. Co. Bt. Laws, 124. Id. 126. 6 Ves. 94. — 9. If a creditor obtains goods from a bankrupt a few days before he fails, and on suspicion that he was about to do so; he will not be allowed to retain the goods, and to prove for the residue. 3 Bro. 46. — 10. Where a person takes a bill without the name of the party from whom he receives it, it may be either as a pledge, or a purchase, according to the agreement of the parties. If it is taken as a pledge, it must be sold; but if as a purchase, it liquidates the debt to the full amount of the bill. Co. Bt. Laws, 124. 1 Ld. Raym. 442. 12 Mod. 241. Comyn's Rep. 57. — 11. Difference between bills, and property whose value is only ascertainable by a sale; creditor may take bills at their amount, and prove for deficiency. 1 Rose, 324. 1 V. & B. 280. 1 Rose, 325. — 12. If a debtor, by way of collateral security, delivers a bill of exchange or promissory note to his creditor, without his name appearing upon the paper, it must be disposed of as a pledge; and the produce applied to reduce the debt, the residue of the demand being only proveable under the commission. Co. Bt. Laws, 124. — 13. Bill drawn by vendee's banker at three months, accepted before due, given by his order in payment; upon bankruptcy of vendee, banker, and acceptor, bill, being a pledge, must be made available first against the estates of the two last. Cox, 194. — 14. Sale of mortgaged premises, and proof for deficiency, is provided for by the general order of 8th March 1794. 1 Rose, 444. — 15. Sale ordered of lease not assignable, but assigned without licence, and proof for deficiency. 1 Rose, 432. — 16. If a creditor has a joint security from the bankrupt and another person, he is not obliged to deliver up the security; being entitled to recover what he can from the co-surety, and to prove the whole debt, or such part thereof as he has not received at the time of the bankruptcy, and receive dividends under the commission upon the proof, provided he does not receive more than 20s. in the pound upon the whole debt. 2 Atk. 527. 1 Atk. 109. — 17. Sale of a pledge of joint property does not prevent proof against the separate estates of the bankrupts, if there is no other joint property. 2 Mad. 262. — 18. When a creditor offers to prove a debt, he is to swear whether he has a security or not: if he has a several security, and insists upon proving, he must deliver up the security for the benefit of the creditors at large. 1 Atk. 104. — 19. Every security that a creditor has for his debt, must be produced at the time of his proving, when the commissioners will mark them as having been exhibited. Co. Bt. Laws, 129. — 20. If the creditor

If an executor becomes a bankrupt (*b*), the legatee (*c*) shall be a creditor.

So, a surety for a bankrupt, who has paid the debt. R. 2 Cro. 127.

Or, the bail for a bankrupt, who has paid the condemnation.

Or, a debtor, though the day of payment is not yet come. (*d*)

So,

has a judgment, he ought to produce an office copy of the judgment to be exhibited; for upon a petition to have the proof of a debt admitted, which the commissioners had rejected, because the creditor had not an office copy of the judgment to exhibit, the petition was dismissed with costs. Co. Bt. Laws, 129. 1 Atk. 83. — 21. Permission to a creditor who had proved, and thereupon given up his security, to retract his proof, refused. 18 Ves. 290. — 22. A creditor holding security, has, with a view to the choice of assignees, a right to have the security taken at its value, and to prove for the difference. 1 Rose, 322. — 23. If creditors abroad obtain a priority of payment out of the bankrupt's effects there, by attachment or other process, and apply to prove there debts here; they will not be permitted to come in under the commission on the same footing with the creditors in this country, unless they abandon their priorities obtained abroad. Doug. 161. 1 H. Blac. 665. Co. Bt. Laws, 301. 8 Ves. 82. — 24. If a landlord distrains for arrears of rent, and proves his debt under a commission, he must be put to his election, to waive his proof or his distress. 1 Atk. 105. And Lord Hardwick intimated, that he considered the landlord was not barred of his distress by having proved under a commission; that he might waive his proof after he had received a dividend, and upon refunding the dividend, be allowed to resort to his remedy by distress; for a landlord's was a more favourable case than a common creditor's, who had often been allowed, upon refunding a dividend, to bring an action at law for his debt. — 25. If a creditor has obtained an unfair possession of the bankrupt's property, his share of the dividend may be retained until he gives up the property. 3 Bro. 46.

(*b*) 1. If the testator's property cannot be distinguished from the bankrupt's, proof must be made for the amount due to the testator's estate, and in strictness a bankrupt ought to be admitted a creditor, for that which he is entitled to as executor, against his own estate; but the court will secure the property by ordering the dividends to be paid into court, or the bank, subject to further order. 1 Atk. 152. 2 Bro. 596. Co. Bt. Laws, 153. — 2. In some cases, a receiver has been appointed by petition to prove against the bankrupt's estate, and receive dividends. 1 Atk. 101. Co. Bt. Laws, 137. But if the testator's property is considerable, or it is necessary to take an account of the assets, the creditors of the testator must proceed by bill. 2 Bro. 596. — 3. Proof by the bankrupt as executor, allowed, in respect of assets exceeding what he was authorized by testator to trade with. 1 Buck, 202. See 10 Ves. 110. — 4. If a bankrupt and another person are joint executors of a creditor of a bankrupt, and there is a suit pending in the ecclesiastical court as to the executorship, the solvent executor must prove against the bankrupt's estate; but the court will order the dividends to be paid into the bank, pending the contest in the ecclesiastical court. 3 Bro. 198. — 5. Proof in respect of trust property continued by the bankrupt, as administratrix, in trade, allowed. The bankrupts were the administratrix and the partners who survived testator. 2 V. & B. 414. — 6. Where K. and S., trustees of money in the funds, sold it out for the benefit of S., who died insolvent, and K. became a bankrupt; the Lord Chancellor held, that the person interested in the trust fund, might prove against the estate of K. the value of the funds at the time of the bankruptcy, although the estate of S. only was benefited by the breach of trust. 3 Bro. 196. — 7. Proof against husband of executrix allowed, he having admitted assets in answer to a bill filed against them. 1 Sch. & Lef. 173.

(*c*) 1. If a legacy be given to A., payable at 21, or marriage, with interest, it is a vested legacy; and if the executor having the legacy in his hands becomes a bankrupt, the legatee may prove it under his commission. 2 Bro. 305. — 2. Proof by legatee against the bankrupt executor, allowed on behalf of self and others, without previous application to commissioners, with direction to pay dividends into the bank; proof by executor having committed a *devastavit*, precluded. 2 Rose, 413.

(*d*) 1. Debts not due at the time of the act of bankruptcy (now, at the date of the commission, by 46 Geo. 3. c. 135.) are not proveable. 2 B. & P. 1. — 2. And the rule to decide whether a debt due from a bankrupt, accrued before the bankruptcy or since, is to consider whether the creditor could have enforced payment before the bankruptcy. If he could not, the debtor is not discharged by the certificate. 1 T. R. 369. 6 Ves. 811. — 3. A father, being tenant for life of an estate, with remainder to his son

So, an executor, though he has not a probate of the testament before the bankruptcy. R. 2 Show. 253. Ray. 479. (e)

So, by the st. 7 Geo. 31. whereas merchants and traders in goods often sell on credit, and take bills, bonds, notes payable at a future day, all persons who have given, or shall give credit on such securities to any who becomes bankrupt, on a good and valuable consideration *bonâ fide*, &c. shall be admitted to prove their debts, &c. and to have distribution with a rebate of interest, &c. as if the debt was payable presently, and not at a future day. (f)

Creditors,

son in tail, the father and son join in mortgaging the estate for the debt of the father. The father becomes bankrupt, and the mortgaged estate is sold under the commission. The son cannot prove any debt under the commission in respect of his interest in the estate, not being damnified until after the bankruptcy. Cox, 105.—4. The statute, 46 G. 3. c. 135. is a remedial law, not a restrictive one; it is to enable those to prove who could not prove before, not to impose a limitation on those who could. And therefore, though the words, “notwithstanding any prior act of bankruptcy,” are general, they shall not be intended to mean, that wherever there has been any act of bankruptcy prior to the contracting of the debt, a creditor shall only be admitted to prove his debt under the condition therein imposed. 2 M. & S. 479.

(c) 1. Where the demand rests in damages, and cannot be ascertained but through the intervention of a jury, it cannot be proved; thus, for mesne profits, or a breach of covenant to do any other act, except to pay money. Dougl. 584. 6 T.R. 489. 7 T.R. 612.—2. If a demand is partly liquidated, partly not, as the difference of price upon a re-sale, creditors having a security may apply it first to the former, then to the latter, and may prove for the residue. 6 Ves. 94.—3. If a demand, in the nature of damages, be capable of being liquidated, and ascertained at the time of the bankruptcy taking place, so that a creditor can swear to the amount, he may prove it as a debt under the commission.—4. As in an action of assumpsit on a *quantum meruit*. Dougl. 167.—5. Or if a bond be given to replace stock on a given day, and the bond is forfeited before the bankruptcy of the obligor, it may be proved; and the amount to be proved is the dividends due before the bankruptcy, and the value of the stock at the day the commission issues. Co. Bt. Laws, 149. 7 Ves. 302.—6. Or if money be paid by one partner to another (who afterwards becomes bankrupt) for the purpose of being paid over as his liquidated share of a debt to their joint creditors, and it is not so applied, it may be proved by the solvent partner as a debt under the commission. 1 East, 20.—7. So a demand in trover, if for a liquidated amount, may be proved, under a commission. Dougl. 168.—8. Damages liquidated by a security; thus, a note given upon compromising an action for seduction, are proveable. 15 Ves. 289.—9. Where a bankrupt, at the time of his bankruptcy, is indebted in an ascertained or ascertainable sum, it may be proved under the commission, and is discharged by the certificate. 3 T.R. 539. 4 T.R. 570.—10. Equitable demands are proveable. 1 Sch. & Lef. 48. 5 V. & B. 40.—11. Though the debt be contracted after the bankrupt quitted trade, it may be proved. 1 Ld. Raym. 287.

(f) 1. Lord Thurlow held, where parties had engaged in writing to warrant the payment of a bill in like manner as if they had indorsed it, that in order to enable the holder to prove his debt under the statute of rebate, 7 Geo. 1. he must make himself a creditor by indorsement, and that there was no debt proveable under the provision of that statute, but what arose upon the face of the instrument. 2 Bro. 614.—2. But Lord Eldon has since held, that a letter from the parties upon whom bills were drawn, undertaking to accept the bills, was clearly settled to be an acceptance at law; and upon the assignees declining to try it, he made an order for the bills to be proved under the commission. 6 Ves. 9.—3. Contingent debts are not within the st. 7 G. 1. it being impossible to make a rebate of interest upon them according to the statute, from the uncertainty whether they would ever become due. Contingent debts are, therefore, in the same situation as before the statute, except in the case of particular debts provided for by the legislature. 2 P. Wms. 396. 2 Ld. Raym. 1546. Str. 866. 1 Atk. 113. 3 Wils. 270.—4. The statute is confined to debts, for which a written security has been given. 2 P. Wms. 395. 4 East, 438. 9 East, 498, and cases therein cited.—5. If a bill be drawn before a trader becomes a bankrupt, and protested after-

Creditors by judgment, statute, recognizance, specialty with penalty, &c. attachment, or other security, by the st. 21 Jac. 19. shall not be relieved upon such judgment, &c. but for a rateable part of their just debt, without respect to the penalty contained in such judgment, statute, recognizance, specialty, &c. 21 Jac. 19.

And by the st. 21 Jac. 19. the commissioners may examine any upon oath, or otherwise, for the discovery of the truth and certainty of his debt, for which he seeks relief by such commission.

But a mortgagee is not entitled to relief within the statutes of bankrupts; for he may help himself by his mortgage. Ch. R. 466.

So, if a bankrupt purchase lands, and part of the money is not paid, the land shall be charged with it. 1 Ver. 267, 8.

Nor a man, who has goods pledged to him for his money, before the bankruptcy. (g)

Nor

wards, it is nevertheless a debt proveable under a commission; for it is *debitum in presenti solvendum in futuro*. 2 Stra. 949.; and cited 3 Wils. 16. — 6. A bond, payable by instalments, given in consideration that the obligee would marry, and settle a small estate upon a servant maid, and also maintain a bastard of the obligor, is within 7 Geo. 1. c. 31, and therefore proveable under the obligor's commission. Cowp. 742. — 7. By stat. 49 Geo. 3. c. 121. s. 9. it is enacted, that all persons who shall give credit upon good and valuable consideration *bonâ fide*, for any money whatsoever not due or payable at or before the bankruptcy of the person credited, may prove their debts under the commission, deducting a rebate of interest for what they receive, to be computed from the actual payment thereof, to the time such debts would become payable, according to the terms upon which the same were contracted. — 8. Money due upon a judgment for mesne profits is not within sect. 9. of 49 Geo. 3. c. 121. Wightw. 16. — 9. By st. 19 Geo. 2. c. 32. s. 2. the obligee in any bottomree or *respondentia* bond, and the assured in any policy of insurance, made and entered into before the bankruptcy, upon a good and valuable consideration, *bonâ fide*, shall be admitted to claim under the commission, and to prove his demand, after the loss or contingency shall have happened. — 10. And insurances upon lives are within the statute. Dougl. 166. — 11. But a debt, upon a policy of insurance, effected during peace, where the loss happens by capture after the commencement of hostilities, is not proveable. 4 Mon. Bt. Laws, App. 13. — 12. Agents having effected policies of insurance with a bankrupt, may prove, if the parties interested are abroad. Stat. 49 G. 3. c. 121. s. 16.

(g) 1. No lien upon bankruptcy, by lying in prison, can be created after the first arrest. 2 Ves. J. 286. — 2. General assignment of all effects an act of bankruptcy; giving, therefore, no lien. 2 Ves. 286. But a lien, under a previous deposit and execution, was held not affected. 2 Ves. 286. 1 Ves. & Beam. 518. — 3. The vendor of an estate has a lien for the purchase money; and if upon a re-sale the estate produces less, he may apply the proceeds of the sale, first in liquidation of the charges of sale, and then of the where a person agreed to sell some standing trees, to be cut and taken away within a limited time, and to be paid for by instalments on fixed days; and the vendee cut and took purchase money, and prove for the difference. Co. Bt. Laws. 123. 6 Ves. 94. — 4. And away part, but not the whole of the trees, within the limited time; the vendor was held, upon the bankruptcy of the vendee, to have a lien upon the remainder; and to be entitled to prove for the amount of the trees taken away. 4 Mo. Bt. Laws, Appendix, 16. — 5. Upon the bankruptcy of the purchaser of a chattel, viz. timber felled, whether the vendor has a lien, and may prove the deficiency, *quære*. 12 Ves. 379. — 6. Judgment creditors have no lien upon lands article to be sold before a bankruptcy, the conveyance to which remains unexecuted at the bankruptcy. 2 Rose, 192. — 7. A specialty creditor has the same right, under the bankruptcy of the heir of the debtor, as if he had not become bankrupt; and may, therefore, follow the real assets, or their specific produce, in the hands of the assignees. The subject being small, relief was given on petition. 5 Ves. 449. — 8. Deposit of a mortgage and bond by the mortgagee, without notice to the mortgagor. The mortgagee becoming bankrupt, his assignees were decreed to assign accordingly. 9 Ves. 411. — 9. In an action on a promissory note, the plaintiff became bankrupt; the assignees gave the defendant notice,

Nor a man, who lends money to a bankrupt after his bankruptcy, and a commission against him, though without notice of it. Per 2 Com. Rawlinson cont. 2 Ver. 157. 161. (*h*)

notice, after judgment, not to pay the debt recovered to any but their order; the attorney sued out a *sci. fa.* in the name of the bankrupt, the note having been deposited with him since the beginning of the action, to secure a debt due from the bankrupt. A rule to set aside the *sci. fa.* was discharged. 2 Anst. 577. — 10. If a candle-maker or maltster forfeit the single duties, and then become a bankrupt, and is convicted after the assignment of his estate, the double duties may be distrained for on the candles, malt, utensils and materials, in the hands of the assignees. Dougl. 411. — 11. Stock secured by bond, and the collateral securities of real estate, to be replaced at the end of three years; and in the meantime, the dividends to be paid as they accrued due. The dividends are not paid. Afterwards, and before the expiration of the three years, the obligor becomes a bankrupt. Held, that the obligee was entitled to have the proceeds of the sale of the real estate immediately laid out in the purchase of stock, without waiting the expiration of the three years. 1 Buck, 188. — 12. A packer is entitled to retain goods sent him to pack and press, against a demand made for them by the assignees of a bankrupt, until he is paid the price of packing, and any other debt due to him from the bankrupt. 1 Atk. 228.

(*h*) 1. Where a verdict for damages is obtained before, but judgment is signed after bankruptcy, the demand is not proveable. 16 Ves. 256. 14 East, 197. 2 M. & S. 70. — 2. Where judgment, in an action upon the case, is obtained after the bankruptcy, the costs are not proveable. 3 Wils. 270. 1 Atk. 140. 3 Wils. 270. 11 Ves. 652. 2 N. R. 191. n. 14 East, 210. 2 M. & S. 70. accord. 1 H. B. 29. 1 H. B. 29, contra. See 2 N. R. 190. 2 Str. 1195. Cowp. 138. — 3. Where judgment in an action for a debt commenced before, is given after bankruptcy, the costs, *comme semble*, are not proveable. 2 Mont. note 3 C.—Cases that they are proveable, are, Str. 1196. 1 Wils. 41. 14 East, 200. 2 Blk. 1317. 2 Bro. 597. 1 H. B. 29.—Case that they are not proveable, is Anon. 1 Atk. 140; said in Burr. 2445, to have been over-ruled; see 11 Ves. 650. — 4. The rule, however, has been laid down, that costs have relation to the judgment; and therefore, that if a judgment may be proved under a commission of bankruptcy, so may the costs. 2 T. R. 261. — 5. And clearly, if a party become bankrupt after final judgment is signed against him, the costs are proveable. 2 T. R. 261. 11 Ves. 647. — 6. If the plaintiff, after a verdict found for the defendant, but before judgment signed, become bankrupt, the costs are not proveable under the commission. 1 Mars. 346. 5 Taunt. 240, 778. — 7. So, the costs of a nonsuit before bankruptcy, not taxed till after, are not *comme semble* proveable. 1 Mont. 180. 1 Mars. 346. 5 Taunt. 347, having, *semble*, over-ruled 1 B. & P. 134; and 5 T. R. 365, having been decided upon Cowp. 138, a case doubtful, and not applicable. — 8. If an action be commenced after the bankruptcy, for the recovery of a debt proveable under the commission, and judgment be recovered against the bankrupt, the costs are not proveable. Str. 1194. 1 Wils. 41. 11 Ves. 659. Cowp. 138. 2 N. R. 190. — 9. The costs of a writ of error, brought upon a judgment the costs of which are proveable under the commission, are also proveable. 6 T. R. 282. Str. 1196. — 10. The costs of a *scire facias* to revive a judgment, or of affirmance on a writ of error, are a debt by relation back to the time of that judgment; and are therefore proveable under the defendant's commission, if the judgment itself can be proved. 6 T. R. 282. — 11. If, after judgment in *assumpsit* by default, and inquiry executed, defendant become bankrupt, and final judgment is suspended by an injunction dissolved after bankruptcy, costs, when taxed, are proveable. 3 Bro. 46. — 12. If an action is brought against a bankrupt as executor after the commission, and he incurs costs of suit by a false plea, the costs are not proveable under the commission. 3 Burr. 1368. — 13. Costs upon petition ordered before, but taxed after the bankruptcy, are not proveable. Cooke, 192. — 14. The costs of a suit in chancery directed to be paid by an award made before the bankruptcy, but not taxed until afterwards, are not proveable. 9 East, 318. — 15. A bond (and warrant of attorney), given by a bankrupt after his bankruptcy, in order to obtain his liberty, extinguishes the original debt accrued before the bankruptcy, and creates a new one, which cannot be proved under the commission. 1 T. R. 715. — 16. If a bond is given with a *penalty*, and there is a *forfeiture* of the penalty at law before the bankruptcy, the bond may be proved under a commission. As if a father gives a bond to his intended son-in-law, on the marriage of his daughter, to pay a sum of money after his death, and interest upon particular days during his life, and there is a breach

So a man, who has an execution, or an extent served or executed upon the lands or goods of a bankrupt, before he becomes bankrupt, needs no relief by a commission of bankruptcy. *Semb. per st. 21 Jac. 19. Vide post, (D 20.)*

So a man who has a bond from A. with condition, that his executors pay 400 *l.* to B. if (i) she survive two months after his decease, shall not

of the condition of the bond by non-payment of interest, and the father becomes a bankrupt, such bond may be proved under a commission; for it is a legal debt at the time of the bankruptcy by the breach of the condition, and not depending upon contingency. *Davies, 530. 1 Atk. 116. — 17.* And it seems that if the arrears of the interest be accepted after the forfeiture, it is not a waiver of the forfeiture, and the bond will be proveable under a commission. *See 1 Atk. 118. — 18.* So, where a bond is given by a husband to pay a sum of money in his lifetime to trustees, to be laid out upon the trusts mentioned in the marriage articles, and the husband afterwards confesses a judgment upon the bond; if the husband becomes a bankrupt, this debt may be proved under his commission. *Co. Bt. Laws, 212. — 19.* And note, that a bond is forfeited by breach of any one of its conditions (where there are several), and therefore proveable. *2 Rose, 416. — 20.* If a bond be payable upon demand, and interest has been paid upon it, but no demand of payment has been made, it may be proved under a commission. *Co. Bt. Laws, 146. — 21.* A bond given to replace stock by a given day, forfeited before the bankruptcy, is proveable. *Co. Bt. Laws, 149. — 22.* If not forfeited before the bankruptcy, it is not proveable. *8 Ves. 334. — 23.* Bond to secure a re-transfer of stock, and payment of dividends in the meantime; bankruptcy after the day mentioned; proof admitted for amount of dividends due before bankruptcy, and value of the stock at the date of the commission. *7 Ves. 301. — 24.* Proof allowed for money lent upon parol engagement (failing by bankruptcy) to give security to replace stock upon a given day. *9 Ves. 115. — 25.* If an annuity is secured by covenant, and bond forfeited by non-payment before the bankruptcy, the creditor may prove, or proceed at law for a breach of covenant. *7 Vin. 71. Dougl. 93. 10 Ves. 351. 1 Atk. 251. Ibid. 1 Bro. 268. Secus, if not forfeited. 2 Blk. 1106. See now the statute, infra. — 26.* But annuity bond considered not forfeited, where an acceptance had been taken for arrears. *5 Ves. 708. See Dougl. 519. — 27.* Accordingly, value set upon annuity secured by bond, penalty being forfeited. *14 Ves. 574. — 28.* A testator, to whom a bankrupt was indebted 1,200 *l.*, by his will forgave him 1,000 *l.* part thereof, if he should pay to his sister 60 *l.* a-year; but if he should fail in so doing by two months, the executrix was to call in the 1,200 *l.*, and the sister to have the interest thereof for her life; and if he should punctually pay the same, then after the decease of the sister he was to pay 200 *l.*, the residue, to the executrix. The payments had been several times in arrear, but had been afterwards paid, and the sister's receipt taken for them. Upon petition, the Lord Chancellor admitted the executrix to prove the 1,200 *l.* for the benefit of the sister. *2 Bro. 609. — 29.* And where a debt was forgiven by a testator, upon condition that the debtor should pay an annuity to his sister; but if he failed at any time in doing so by two months, the executrix was to call in the whole debt; and default was made in the payment of the annuity, and the debtor became a bankrupt; the Lord Chancellor ordered, that the executrix should prove the debt. *2 Bro. 609.*

(i) 1. Debts depending upon a contingency, which has not taken place at the time of the bankruptcy (now, the date of the commission, *vide supra*), cannot be proved. *2 P. Wms. 395. 2 Str. 867. 1 Atk. 114. 3 Wils. 270. 3 T. R. 435. Dougl. 165, n. accord.; dict. in 2 P. Wms. 497, contra. — 2.* Hence, a debt payable at a future uncertain period, is not proveable. *9 Ves. 110. — 3.* So a bond payable upon a contingency, which does not happen until after the bankruptcy, is not proveable. *2 P. Wms. 396. — 4.* So a contract to replace stock upon demand, if no demand, is not proveable. *8 Ves. 337. — 5.* So in the case of a covenant in a marriage settlement to transfer stock upon one month's notice into trustees' names, with leave to trustees to forbear notice during covenantor's life; proof refused. *1 Rose, 323; 1 V. & B. 176. — 6.* So in that of a covenant within seven years, or upon request to convey lands of a given value; bankruptcy after seven years, but no request; proof refused, unless covenant secured by penalty. *8 Ves. 335. — 7.* So a contract to pay another's debt upon notice; if no notice, is not proveable. *14 Ves. 189. — 8.* And if a man becomes bail for another, and before he is fixed is made a bankrupt; or if in the case of bail in error, before judgment is affirmed; the debt is contingent at the time of the bankruptcy, and cannot be proved under a commission against the surety. *2 Stra. 1043.*

Vide

not have distribution within the st. 7 Geo. 31. for perhaps the money will never be due. Adm. in B. R. and afterwards affirmed in error. Trin. 3 Geo. 2. Sparks and Tully (*k*) (reported 2d Ld. Ray. 1546, 1570. (*l*))

(D 4.) The

Vide supra. — 9. So where the contingency upon which judgment is to be entered up, under a power of attorney, does not happen until after the bankruptcy, the debt is not proveable. 8 T. R. 386. — 10. A note is sent to a banker with a letter, stating it to be a security, and to be delivered to the payee upon a contingency; no cause of action accrues until the event has happened. 2 Stark. 232. — 11. One having only a cause of action cannot prove; because the damages that may be given are considered merely as contingent. 8 Ves. 335. — 12. Therefore, if a lessee ploughs up meadow ground, for which he is bound to pay the lessor a certain sum of money, as a penalty; that penalty cannot be proved as a debt under the commission; or if a man be bound in an obligation, in a certain sum to perform covenants, and the obligor, before he becomes a bankrupt, breaks those covenants, the obligee cannot prove this as a debt under the commission. Co. Bt. Laws, 192. 3 Wils. 270. — 13. But if there be a legal debt, though liable to be defeated afterwards on a contingency, it may be proved under a commission. 8 T. R. 389. — 14. And in the case of a legacy payable at twenty-one or marriage, it is a vested legacy, and may be proved under a commission against a bankrupt executor. 2 Bro. 305. — 15. A judgment at law, with a defeazance, is a debt, notwithstanding the defeazance, and may be proved under a commission. 1 Atk. 117.

(*k*) 1. A. purchases an annuity of B., secured upon lands in fee-simple, falsely represented to be of equal value with the annuity, and under that representation, not enrolled. Upon a petition to prove for the value of the annuity, the Chancellor gave liberty to prove, without prejudice to a bill, reserving dividends. 1 Rose, 308. — 2. A bond, although it is not assignable at law, may be proved by the assignee under the commission; the assignor, however, must join in the deposition that he hath not received the debt, or any part thereof, or any security or satisfaction for the same. Co. Bt. Laws, 146. — 3. The drawer of a bill accepted before, but dishonoured after his bankruptcy, is discharged by his certificate. 7 East, 436. 3 Smith, 441. — 4. The discount of a bill, without the bankrupt's name, may, or may not prove, according as he took the bill as a pledge, or as a purchase; in the former case, he may; in the latter, not. 12 Mod. 241. Com. 57. 1 Ld. Rd. 442. 3 Ves. 368. 10 Ves. 206. — 5. Guaranty of a bill expressly, as if surety had indorsed it; bill due after bankruptcy; no proof. 15 Ves. 288. — 6. The holder of notes not negotiable, having received them from an intermediate person, cannot prove them as a debt against the maker. 2 Rose, 225. 1 Buck. 31. — 7. The indorsee of a bill assigned since the bankruptcy, can only prove, as indorser could, at the time of the bankruptcy. Cox, 423. — 8. Petition by assignor of a bill, writing over payee's blank indorsement "pay to A.," and taking up bill upon acceptor's bankruptcy, to prove, dismissed with the offer of a case. 1 Rose, 20. — 9. The holder of the cash notes of a bankrupt, though issued and dated before the bankruptcy, cannot prove under the commission, or set them off against a demand due from him to the bankrupt, without proof that he took them before the bankruptcy. 6 T. R. 57. — 10. If the acceptor, or other party to a bill become bankrupt, and the indorser is obliged to take it up in consequence of the bankruptcy, he may prove the bill under the commission against the acceptor, although it was not taken up till after the commission was issued. Co. Bt. Laws, 165. 1 Atk. 123. 7 T. R. 565. 1 H. Bl. 640. 3 East, 72. 177. 2 New Rep. 180. 3 Ves. 304. accord. 4 T. R. 714. contra. — 11. Where the indorser of a bill of exchange became bankrupt, and the holder proved the amount under the commission, and afterwards received a composition from the acceptor in discharge of the debt, without the consent of the assignees of the indorser; it was held, that the holder of the bill had thereby discharged the estate of the indorser, and that the proof of his debt should be expunged. 3 Bro. 1. Cooke, 155. — 12. If the acceptor of a bill of exchange, for the accommodation of the drawer, is obliged to pay the amount, he may prove the debt under a subsequent commission against the drawer, although he has not received any security; but if he is not obliged to pay the amount until after the bankruptcy of the drawer, he cannot prove the amount under the commission. 1 Atk. 122. 3 Wils. 13. 346. 528. 7 T. R. 364. — 13. And a parol promise to indemnify the acceptor from all costs and damages to which he may be put by reason of the acceptance; or a written undertaking to pay the bill when due, will not enable the acceptor to prove, if the bill is not paid before the bankruptcy. 3 Wils. 13. 528. Co.

Co. Bt. Laws, 153. Dougl. 166. See 49 G. 3. c. 121. s. 8. — 14. Counter acceptances are good mutual considerations for such acceptances, therefore, if two traders exchange acceptances, and afterwards become bankrupt, each may prove the other's acceptances under his commission, though the acceptances of neither be due at the time of such bankruptcy. 2 H. B. 570. 7 T. R. 565. — 15. If two traders having exchanged acceptances, one becomes bankrupt, whereupon the other is obliged to pay the acceptances of both, and the bankrupt obtains his certificate; the other cannot recover from him any of the money so paid; for, as to his own acceptances, he is bound to provide for them; and as to the others, they were proveable under his commission; and it is immaterial whether the acceptances exchanged be the acceptances of the parties themselves, or of other persons. 7 T. R. 565. 3 East, 72. — 16. Proof by bankers upon bills remitted upon banking account, they discharging their own acceptances. 8 Ves. 531. — 17. Cross paper between two houses, both become bankrupt; as between the two estates, no proof can be made in respect of the bad paper, or the excess of damage eventually sustained upon that account. 4 Ves. 373. — 18. Cross paper dishonoured upon each side, both parties being bankrupt; as between the two estates the proof was confined to the cash balance, without regard to the dishonoured bills. 5 Ves. 833. — 19. Defendant draws a bill of exchange on the plaintiffs, payable to the defendant's own order; plaintiffs, on his request, and on promise to indemnify them, accept the bill, which falling due after defendant becomes bankrupt, they pay to avoid a suit. This debt is not proveable. 3 Wils. 347. 528. 2 Blk. 839. — 20. If the holder of a bill of exchange give time to, or take security from, the acceptor, or neglect to give notice of non-acceptance or non-payment, he discharges the drawer and indorsers, unless the acceptor had no effects in his hands; in which case the drawer cannot be injured by the want of notice, and the bill may be proved under his commission. Co. Bt. Laws, 168. — 21. A. and B. interchangeably accept accommodation bills. B's bills are discounted with C., who, upon their becoming due, agrees to renew them; but A. having fallen into discredit, C. does not take his name to the bills, but draws for the amount on B. only; before these new bills become due, A. becomes bankrupt. *Semble*, that B. might have proved the bills under A.'s commission, this being a payment as it were of those bills. B. having arrested A. for the amount of the bills paid to C. after A. obtained his certificate, the court discharged A. on common bail. 2 Smith, 36. — 22. If an acceptance, for the accommodation for the drawer of a bill, be given before, and renewed after he has committed an act of bankruptcy, such renewal is a continuation of the same suretyship; and therefore, if a commission of bankruptcy be issued against the drawer, and the acceptor afterwards pay the bill, he will be entitled to prove the amount under such commission; though, before the renewal of the acceptance, he had notice of such act of bankruptcy having been committed. 15 East, 427. — 23. Bankers residing at different places, mutually agreed to return each other's notes weekly, together with those of certain other houses, and the deficiency, if any, was to be made up by the one in advance drawing a bill in favour of the other, at a certain date. The one in advance is, from the receipt of the notes, indebted to the other in the excess, which debt is discharged by his subsequent bankruptcy, notwithstanding a neglect to give the bill. 12 East, 605. — 24. If a bill be made payable to a fictitious payee, a *bonâ fide* holder for a valuable consideration may prove it under a commission against the indorser. 3 Bro. 238. Co. Bt. Laws, 172; and see 3 T. R. 174. Ibid. 182. 481. 1 H. Bl. 313. Ibid. 569. 2 H. B. 288. — 25. Where a person had accommodated another, who afterwards became a bankrupt, by accepting a bill of exchange, or by drawing and lending him a promissory note, and had received as a security a bill of exchange or promissory note, upon which the bankrupt's name appeared; it was formerly the rule to permit the person holding the counter-paper to prove it under the commission. Co. Bt. Laws, 157. Ibid. 160. — 26. But the dividends were reserved, until it appeared to what extent he had been damnified, and whether he had exonerated the bankrupt's estate from his own paper. Co. Bt. Laws, 162. — 27. Mr. Cook states, that in *re Bonus and Padmore*, Co. Bt. Laws, 161, it was doubted whether the proofs ought to have been permitted before the party applying to prove had taken up his own paper, or paid the original debt, if he were surety in a bond; and that it seems now to be the settled rule, that the surety claiming to come in as a creditor must, before he can be permitted to prove, take up his own bills, or exonerate the bankrupt's estate from the original debt. — 28. Cross bill of another, given by payees to acceptor for accommodation, not indorsed by them, considered as security; hence, having paid his acceptance before their bankruptcy, allowed to prove. 3 Mad. 117. — 29. Proof by the owner of a lost bill allowed, but the most extensive indemnity to be settled by commissioners, required. 6 Ves. 812. — 30. If an award be made before bankruptcy, it creates a debt at law which may be proved under a commission. Therefore, where a trader was taken up on an attachment,

ment for not performing an award, and became a bankrupt, and obtained his certificate, he was discharged upon motion. 2 Str. 1152. — 31. An apprentice may prove for the premium paid, deducting a proportionate part for the time he has lived with the master. 1 Atk. 149. — 32. But it has been usually recommended to creditors, to allow the apprentice a gross sum out of the bankrupt's estate, for the purpose of putting him out to another master for the rest of his time. 1 Atk. 260. — 33. Proof by the parish to which the bankrupt was indebted as overseer. 6 Ves. 811. — 34. If a collector of taxes become a bankrupt, an inhabitant of the parish may prove under the commission, for himself and the rest of the parishioners; and the form of his affidavit should be, that neither he or the rest of the parishioners, to his knowledge or belief, had received any security or satisfaction. 1 Atk. 111. — 35. Where there are joint collectors, the solvent collector should prove. Co. Bt. Laws, 128. — 36. Proof allowable in respect of an order in chancery for payment. 2 Rose, 196. — 37. School-money for the education of the bankrupt's son was payable half-yearly; the bankruptcy took place a few days before the end of the half-year. The debt is not proveable. 4 East, 438. — 38. Money paid to the assignees of a bankrupt as such, under a mutual error and mistake of fact, may be recovered back, and the payer cannot, and therefore need not prove it under the commission; it never was a debt due from the bankrupt's estate. 2 T. R. 645. — 39. Proof by the banker to the commissioners' estate, himself a bankrupt, will not be allowed, until first estate has been satisfied the sums received by banker. 19 Ves. 222. 2 Rose, 74. 3 V. & B. 130. — 40. *Bona fide* holder of an unstamped bill will not be allowed to prove, though the fact that the bill was drawn in England, appears only from bankrupt's examination. 1 Rose, 68. — 41. Proof of a debt barred by the statute of limitations, will not be allowed; and if admitted, will be expunged. 15 Ves. 479. 2 Rose, 245. — 42. An illegal demand is not proveable; as one tainted with usury. 1 Atk. 125. 9 Ves. 489. 9 Ves. 84. Cooke, 187. — 43. A creditor having discounted a note, may prove its whole amount. But commissioners have established a rule, (which Lord Hardwicke approved of,) not to allow interest, unless it is expressed in the body of the instrument. 1 Atk. 150. — 44. An assignee or indorsee of a bankrupt's notes, bought in at 10s. in the pound, may prove and receive dividends for their full amount. 1 P. Wms. 782. — 45. Payment of part before the time of proving, limits the proof to the residue. — 46. But, notwithstanding part payment after proof, creditor may receive dividends upon the whole bill, so as they do not exceed 20s. 1 Atk. 106. 109. 2 Ves. 113. accord. 2 P. Wms. 407. Ibid. 89, contra. — 47. So, dividends declared upon a bill, though not received, must be deducted from indorser's proof under another commission. 6 Ves. 644. — 48. At the time of commission issued against A. by indorsee and discounter for C. of A. and B.'s acceptance, the debt was reduced by D.'s payments upon account; indorsee was allowed to prove for the whole debt, and held a trustee for C. as to the excess. 1 Rose, 10. — 49. If bills are proved under a commission, and accepted as a security, by a person who discounted them for the bankrupt, or took them as a security for a general balance, or for a debt exceeding their amount, and any of such bills are afterwards duly honoured, or in any way fully satisfied, they must be deducted from the proof, and the future dividends made only upon the residue of the debt. Co. Bt. Laws, 155. — 50. So, if bills of exchange have been given as a security for a general balance, or for a debt exceeding their amount, and upon a bankruptcy the creditor has proved the whole amount of his debt, excepting such bills, if any of them are duly honoured, or by any means fully satisfied, they must be taken as a payment *pro tanto*, and the future dividends made upon the residue of the debt. Co. Bt. Laws, 155. — 51. If a person discounts several bills for another who afterwards becomes bankrupt, and the holder proves the aggregate amount of the bills, excepting them as a security, and any of the bills are afterwards paid in full; the amount of the bills paid must be deducted from the proof, and the future dividends be paid upon the residue of the debt only. Co. Bt. Laws, 155. — 52. Proof (not dividend merely) against acceptor of bill given by drawer, since a bankrupt, as security for a bill discounted, limited to original debt. 5 Ves. 449. — 53. Proof by bill-holder, whether indorsee or not, admitting that bill is held as security: subsequent part payment by others, parties to bill, must be deducted from proof, or if dividend paid, excess refunded. 2 Rose, 35. — 54. Creditor upon bill and simple contract, proves both; then receives amount of bill from others, parties thereto; dividend limited to residue. Cox, 201. — 55. A trader in England directed his correspondent in Philadelphia to draw bills for payment of a sum of money due to him; after the bankruptcy of the trader, some of the bills were protested and returned for non-acceptance, others for non-payment; by the law of Philadelphia, the drawer or indorsee of a bill of exchange returned for non-payment, must pay such returned bill with 20 per cent. advance for the damage; the drawer accordingly paid it. Drawer allowed to prove the 20 per cent. under the commission against the trader. Amb. 672. — 56. Navy bills were deposited with a firm, who gave

a note specifying them, and promising to be accountable; one of the firm soon after became a bankrupt; the person who deposited the bills was allowed to prove the value of them on the day of the deposit. 1 Atk. 258. — 57. Sale of goods to consignor held a return, and no proof in respect of them under the terms of consignment. 18 Ves. 254. 1 Rose, 165. — 58. Sale; 20 per cent. discount upon payment within a year, which was not done. Discount deducted, upon proof against vendee. 3 Mad. 136. — 59. The petitioners sold goods to a bankrupt, and agreed, if prompt payment were made, to deduct 33 per cent. from the price; the bankrupt did not pay according to the stated times, and the question was, whether the petitioners could prove the whole charge for the goods, or must deduct the 33 per cent. agreed to be taken off in case of prompt payment. Argued, that this was a contract to accelerate payment, rather than to give day of payment; but held, that they could not make the debt more than the real price of the goods, and petition dismissed. Co. Bt. Laws, 191. — 60. Deduction of payment under a policy against a contingency invalidating security given by debtor. 2 Rose, 410. 1 Mad. 573. — 61. Costs incurred by protesting bills before an act of bankruptcy, may be proved under a commission; not those incurred after. 1 Atk. 140. 2 Bro. 597. — 62. Re-exchange, where it includes damages and costs arising upon protests of bills after the bankruptcy, cannot, it seems, be proved; but if the re-exchange is only the value in sterling money of the bill payable abroad in foreign money, it is proveable, notwithstanding the value of the foreign money was greater at the time of re-drawing, than at the time of negotiating the bill. Co. Bt. Laws, 173. — 63. If proof for a larger sum than has been admitted, the excess must be expunged, and the dividend paid only upon the residue. Co. Bt. Laws, 124. — 64. So, if proof has been admitted upon an instrument of a larger amount than the real debt, dividends must not be paid to a greater amount than the debt. Co. Bt. Laws, 157. 6 Ves. 449. 600. — 65. And if the consideration of bills of exchange is other bills, the dividends must be retained until the extent of the claim is ascertained. Co. Bt. Laws, 160. — 66. In general, interest stops at date of commission, unless a surplus; when debts *ex contractu*, though not bearing interest, receive it. 1 Atk. 79. 2 Atk. 527. 14 Ves. 573. — 67. Note creditors are not entitled to prove for interest, unless it is expressed in the body of the notes. 1 Atk. 150. 5 Bro. 436. — 68. And if a creditor has a bill or note carrying interest, he may receive the whole interest due; but a creditor by specialty cannot have interest beyond the penalty contained in his security. 1 Atk. 75. 2 Ves. jun. 295. 3 Bro. 489. Id. 495. 2 Ves. 301. — 69. Interest not allowed upon the balance of account stated. 2 Cox, 219. — 70. There is a plain distinction between debts that carry interest and a special deposit of goods and stock; in the former, the interest shall be continued down to the date of the commission; in the latter, it stops from the time of the deposit; a calculation, made of the value of the whole entire thing deposited, both principal and interest, be it stock or goods, according to the market price at the time of the deposit; and interest is not allowed to run on as in the case of a simple debt. 1 Atk. 259. — 71. Interest not allowed beyond the date of commission to mortgagee, proving for deficiency. 4 Ves. 165. Cooke, 161. — 72. But if the mortgage is sufficient to answer both principal and interest, the assignees cannot redeem without paying interest to the time of redemption. 7 Vin. 110. — 73. In common cases, value of annuity to be ascertained by the price paid and time of enjoyment. 2 Rose, 358. 1 Atk. 251. — 74. Stipulated price of redemption of annuity no criterion of value. 1 Mer. 10. 127. 724. — 75. Mode of valuing an annuity granted to an infirm life, since convalescent. 1 Rose, 290. — 76. By stat. 49 Geo. 3. c. 121. s. 17. it shall be competent to any annuity creditor of any person against whom a commission of bankrupt shall issue after the passing of this act, whether the same shall be secured by bond or covenant, or bond and covenant, or by whatever assurance or assurances the same shall be secured, and whether there shall or shall not be or have been any arrears of such annuity at or before the time of the bankruptcy, to prove under such commission as a creditor for the value of such annuity, which value the commissioners shall have power, and are hereby required to ascertain; and the certificate of every bankrupt under whose commission such proof shall be or might have been made, shall be a discharge of such bankrupt against all demands whatever in respect of such annuity, and the arrears and future payments thereof, in the same manner as such certificate would discharge the bankrupt with respect to any other debt proved, or which might have been proved, under the commission. — 77. Fraud upon grant, by grantee's attorney, of annuity, void for want of memorial; proof limited to the money advanced, with leave to file a bill for an equitable lien upon the fraud and the deposit. 19 Ves. 255. — 78. Where a creditor agreed with his debtor to take a composition to be paid by instalments, and after payment of the first instalment the debtor became a bankrupt; Lord Hardwicke thought, that the creditor ought to be admitted to prove the whole

of the original debt, and not the amount of the composition only; and said, that the general rule of equity, with respect to composition of debts, in the case of common creditors and debtors, had been rightly laid down. Eq. Ca. Ab. 28. s. 3. 1 Vern. 210. 2 T. Rep. 24.; that the court would not dispense with the point of time in compositions; for where a creditor agreed to take less than his debt, so that it be paid precisely at the day, and the debtor failed of payment, he could not be relieved. 2 Atk. 527. — 79. Where, under a composition deed, no fund is appropriated for the dividends, a creditor, party thereto, not having received them, cannot upon bankruptcy have them out of the estate, and prove the residue, but must come in, *pari passu*, with the others. 8 Ves. 84. — 80. If in a composition deed, release is to be void upon default in payment, and default is made before bankruptcy, creditors may retain instalments paid, and prove for the residue of original debt. 1 Rose, 281. 19 Ves. 93. *Secus*, if no default before bankruptcy, since then they can only prove for instalments unpaid. 1 Rose, 435. — 81. Assignment in trust, to pay creditors who should execute the deed; and covenant, if not paid in full out of fund within two years, to pay deficiency within a month: upon bankruptcy within the two years, creditors held entitled to prove deficiency, after application of fund, subject to rebate. 14 Ves. 184. — 82. Proof by a creditor, with whom a co-debtor had compounded, expunged. 6 Ves. 146. — 83. If the acceptor of a bill, or the maker of a promissory note, offer to compound the debt with the holder, and the holder accede to the composition, without the previous assent of the other parties to his executing the composition deed, he thereby discharges all the other parties. 3 Bro. 1. Co. Bt. Laws, 171. 11 Ves. 410. — 84. The holder of a bill of exchange or promissory note, is entitled to prove the amount against all the parties to it, under their respective commissions, and to receive dividends under each commission upon the whole amount, until he has received twenty shillings in the pound. 1 Atk. 109. — 85. Whether they be principals or sureties. 10 Ves. 416. 2 Rose, 197. — 86. And, though the instrument is by way of security only. 2 Rose, 87. — 87. But dividends declared upon proof against one party to a security, must be deducted from subsequent proof against another; notwithstanding the proof was subsequent from a present inability to substantiate it, and though a claim had been previously entered, and affidavit of defendant made, to be laid before commissioners at their next meeting. 2 Rose, 197. — 88. The holder for a valuable consideration of a bill of exchange, or promissory note, drawn by way of accommodation, is entitled to prove the full amount against all the parties to it. But if the holder has received it as a security for a less sum than the amount, he can only prove against the estate of the person from whom he received it, the exact sum due to him; although, as against all other parties to the bill or note, he may prove the whole amount, and receive the dividends, provided such dividends do not amount in the whole to more than twenty shillings in the pound upon the sum for which it was paid or deposited with him as a security. Co. Bt. Laws, 157. S. C. 3 Bro. 237. contra 5 Ves. 448. But order reversed, 6 Ves. 600. 449. — 89. Acceptor for honour of drawer should resort to him first, if original acceptor (the bankrupt) had no effects. 5 Ves. 574. — 90. A. obliged to pay a bill which he had procured to be discounted for B., who did not indorse, may prove under B.'s commission, deducting receipts under acceptor's. 3 Mad. 117. — 91. Bill at three months, given, pursuant to order, by debtor's banker to creditor, and accepted; creditor proved, and received dividend against drawer and acceptor: he may prove also against debtor. 1 Buck, 215. And see 10 Ves. 204. — 92. A creditor by bond is entitled to prove his demand against all the parties to it, and to receive dividends upon the whole sum upon each estate, until he receives 20s. in the pound; and if he receives more, he must account for the surplus. But if the creditor has received any part of the debt before he proves under the commission, he can only prove and receive dividends for the residue due to him. 1 Atk. 109. 2 Ves. 113. — 93. As to the right of pledgee for advances, to prove against estate, as well of dormant partner as ostensible owner, see, 1 Rose, 297. — 94. Arrangement in favour of creditor against estate of guarantor of instalment from joint debtor, also bankrupt. 1 Buck, 239. — 95. If a trustee will suffer a co-trustee to detain a sum of money belonging to the trust estate, they are both liable, and if both become bankrupts, the debt may be proved against both estates. 3 Bro. 111. — 96. No equity for one engaged for the whole debt, proving only part, to stand in the place of the payee. 10 Ves. 420. — 97. Assignee for value of a note handed over by debtor to assignor, his creditor, with a written acknowledgement to be accountable to him for it, also assigned, entitled to have the amount made an item in the account between the debtor and creditor, and stand in the latter's place. 2 Sch. & Lef. 112. — 98. Surety entitled to dividends upon debt proved by satisfied principal. 2 Rose, 334. — 99. Surety by bond for advances generally, but under a limited penalty, not liable beyond that amount, and paying that sum is entitled to a proportion of the dividend, under the

proof by the creditor to a greater amount under the bankruptcy of the principal debtor. 10 Ves. 409; see 12 Ves. 435. — 100. Surety not entitled to the benefit of proof against other estates, upon a distinct security. 12 Ves. 435. — 101. A., to discharge a debt due from him to B., procures his banker C. to direct his correspondent and partner D. to accept a bill drawn by B. Before the bill was due, C. and D. became bankrupt; C. being indebted to A. more than the amount of the bill. B. proved against the estate of D.; but afterwards received the whole from A. A. not having proved against the estate of C. in respect of the bill, is entitled to stand in the place of B. against the estate of D., whose proof having been expunged, was reinstated for the benefit of A. 6 Ves. 285. — 102. W., carrying on a separate trade, is also in partnership with G., under the firm of G. & Co. W. in his separate character being indebted to G. & Co. gives that firm a bill of exchange drawn by O & Co. and accepted by him. G. & Co. being largely indebted on a drawing account to F. & Co., pay the bill to them, who indorse it to D. & Co. O. & Co. compound with their creditors, W. G. & Co. and F. & Co. become bankrupts. D. & Co. by the composition, and by proving under the commission of W. and F. & Co. receive 20s. in the pound upon the bill. Held, that although G. & Co. were only indebted to F. & Co. in respect of their acceptances, and which F. & Co. had not taken up when they became bankrupts, yet that the assignees of F. & Co. were entitled to stand in the place of D. & Co. in respect of the proof made by them under W.'s commission, to the extent of the dividends paid to D. & Co. under F. & Co.'s commission. 1 Buck, 237. — 103. The holder of a bill is compellable to prove against acceptor for the benefit of drawer. 6 Ves. 734. — 104. Accommodation bills upon the bankruptcy of the drawer, were fully paid by the acceptors to the holder; who, having a further demand under the commission, proved for the whole, including the bills; he may take out of the dividend, upon the bills, the proportion he would have received upon the residue of his debt beyond the bills, if the debt for the bills had been expunged: the rest of the dividend on the bills belongs to the acceptor. 5 Ves. 243. — 105. A. drew bills to the amount of 3,000*l.* on B., which were indorsed by C. for the accommodation of A.; all the parties became bankrupts, at which time C. was indebted to A., on a distinct account, in 2,000*l.* The assignees of A. proved the debt of 2,000*l.* under C.'s commission, and the several holders of the bills also proved the amount under C.'s commission, and received a dividend of 8s. in the pound. The court directed the assignees of C. to retain the dividend, on the said proof of 2,000*l.*, for the benefit of the general creditors, and expunged the proof of the said 2,000*l.* Cox, 394. — 106. A. and B. bankrupts: proof in respect of a cash balance due from A. to B., but the dividends retained to reimburse the estate of A. what it should over-pay upon a distinct transaction; an advance of bills from A. to B. some of which were dishonoured. 11 Ves. 404. — 107. Where a bankrupt bought his own stock of his assignees, and sureties joined in security for the consideration, and the bankrupt continued to trade for four years, and then died without having obtained his certificate, and having contracted debts subsequent to his bankruptcy; Lord Camden held, that the subsequent creditors were to be preferred to the creditors under the commission. Amb 630. — 108. But Lord Eldon observed upon this case, that very great difficulties occurred, and that it had never been considered as of very high authority. If the bankrupt purchased the stock for himself with the money of a third person, the equity ought to have been administered accordingly; if it was not purchased with the money of a third person, it was purchased with that which was the property of the assignees; and then the sale was without consideration. 15 Ves. 116. — 109. Proof refused in default of disclosure as to receipt and application of money charged with by bankrupt, though tendency of answer to criminate, was objected. 11 Ves. 521. — 110. By stat. 1 Jac. 1. c. 15. s. 4. it shall be lawful for any creditors of the bankrupt, within four months after the commission is sued forth, and until distribution is made by the commissioners, to partake with the other creditors, &c.; and if the creditors come not in within four months, then the commissioners have power to distribute. — 111. Creditors must prove their debts at a public meeting of the commissioners. — 112. By 21 Jac. 1. c. 19. s. 9. the commissioners are empowered to examine upon oath, or by any other ways or means as to them shall seem meet, any person, for the discovery of the truth and certainty of the several debts due to the creditors seeking relief under the commission. — 113. The usual proof is the oath of the creditor. 1 T. R. 369.; which is binding, unless the bankrupt or the other creditors object to it, and then it is examined. But if no objection is made in a reasonable time such proof by oath is conclusive. 1 Atk. 77. — 114. The form of a creditor's deposition is, that the debt was due and owing before the date of the commission. 2 Bos. & Pull. 1. — 115. In extraordinary circumstances, the oath of the creditor may be dispensed with. As where a creditor resided abroad, and therefore had been prevented from having the accounts between him and the bank-

rupt,

rupt liquidated and adjusted, and from the circumstance of his residing in Grenada, it was impossible to make proof of his debt, or settle the accounts, at a meeting advertised for the proof of debts, and declaring a further dividend of the bankrupt's effects: upon petition, the Lord Chancellor ordered, that the commissioners should be at liberty to receive such proof of the debt claimed by the petitioner under the commission, as he should be advised to make, *without requiring the oath of the petitioner* in proof of such debt; and the petitioner should be admitted a creditor under the commission, for what should be so proved to be due to him, and be paid a dividend or dividends in respect thereof, rateably and in equal proportion with the rest of the bankrupt's creditors. And that any meeting for making a dividend under the commission, should be postponed for six weeks from the date of the order. Co. Bt. Laws, 121. — 116. Creditors living remote from the place of meeting, may prove their debts by affidavit; or, being quakers, by affirmation. Stat. 5 Geo. 2. c. 30. s. 26. — 117. The petitioning creditor must prove in person. Supra. — 118. B. joined A. in a bond to C.; B. was surety. A. became a bankrupt. C. made an affidavit of his debt for the purpose of exhibiting it, but did not exhibit it under the commission. He then called upon B. for payment, and received payment. An application was made by B. to be admitted to prove under this affidavit. Lord Eldon said, that had he, before payment, made a claim, and had there been any difficulty in proving the debt, such as no meeting of the commissioners for some months, and there were a particular affidavit stating all these facts, he would, upon an application to the great seal, order the commissioners to receive such proof. It stood over, to inquire more particularly into the facts. Mo. Bt. Laws, 458. — 119. Proof by creditors resident abroad may be by affidavit sworn before a magistrate, and attested by a notary public. Stat. 5 Geo. 2. c. 30. s. 26. — If a collector of taxes prove a debt for taxes, he must produce his appointment or deputation, that the commissioners may judge of the legality of it. Green, 116. — 120. A receiver of a company is the proper person to prove a debt due from a bankrupt to the company; and his appointment under the common seal of the company must be exhibited to the commissioners. Green, 117. — 121. A corporation may prove by the affidavit of a person authorized by a general power of attorney under their common seal. Swanst. 10. — 122. But they cannot prove by their clerk without warrant. 18 Ves. 228; but S. C. 1 Rose, 142. is reported as contra. — 123. Creditor on bill swears to 2,500*l.* as entitled, but proof allowed for 1,200*l.* only. If, previous to allowance of his right, he receives part payment from another party, proof must be anew, and for the residue only. 1 Cox, 309. — 124. Creditors in Scotland are within stat. 5 Geo. 2. c. 30. s. 26. 2 Cox, 8. — 125. *Cestui que trust* must join in the proof of debts; and the trust deed should be exhibited to the commissioners. Green, 149. Cox, 310.; vide Cooke, 211. — 126. In the case of a bond being assigned, the assignee and assignor must join in the deposition, that they have not received the debt, or any part thereof, or any security or satisfaction for the same. Co. Bt. Laws, 146. — 127. A guardian of an infant will, upon petition, be permitted to prove a debt due to the infant. 1 Atk. 251. 2 Bro. 305. — 128. If a navy agent be bankrupt, one of the admirals may prove on behalf of himself and of the crew. 4 Mo. Bt. Laws, 78. — 129. In the case of lunacy, the proof may be by a friend. 1 Rose, 387. — 130. Questions respecting the proof of debts, may be raised in the matter of the bankrupt. 2 Sch. & Lef. 228. — 131. Fraud is a ground for expunging a proof. 19 Ves. 260. 2 Rose, 186. — 132. Examination before commissioners, upon inquiry, is not sufficient to ground an order for inquiry touching the validity of a proof. 1 Buck, 242. 3 Mad. 315. — 133. The *onus probandi*, in relation to usurious transactions, lies in bankruptcy upon the creditor; and if it fails, the debt is wholly expunged. 3 V. & B. 14. — 134. Petition for an issue to try the validity of a debt proved upon the ground of the bankrupt's deposition as to usury, refused. 1 Mad. 46. — 135. Since a verdict is not conclusive of the demand, when impeached, the commissioners are bound to inquire into its circumstances. 1 Rose, 192. — 136. An award made after bankruptcy; proof upon it expunged, and account directed before commissioners. 1 Rose, 149. — 137. Proving under the commission does not estop a creditor from impeaching the commission in an action brought against him by the assignees. 1 Esp. 108. Vide supra. — 138. If a creditor cannot ascertain his debt with certainty, sufficient to enable him to swear to it, or is not able in other respects satisfactorily to substantiate it; or where the agent of a creditor cannot produce his authority, and in many other cases where there appears a probable foundation of a demand, though not sufficiently made out, it is usual for the commissioners to suffer a claim to be entered; but that will not entitle the party to a dividend, which he cannot receive without completely proving his debt. Co. Bt. Laws, 255. — 139. And in case of debts, uncertain in point of liquidation, as between two merchants in balancing accounts, the

(D 4.) The power of the commissioners. (*m*) — For discovery of the bankrupt.

By the st. 13 El. 7. the commissioners, or major part, have full power to take order by their discretion with the body of the bankrupt, wherever

matter rests upon a claim, to ascertain the sum that was due at the time of the bankruptcy. 3 Wils. 271. — 140. If a claim is not substantiated in reasonable time, the commissioners may strike it out, and they generally do so before a dividend is declared, unless sufficient reason is offered to them for prolonging the time; but the creditor is notwithstanding afterwards at liberty to prove his debt, and receive his share upon any future dividends. However, in such cases, where there has not been gross laches, the lord chancellor will make an order that such creditor shall be paid his proportion of the first dividend out of the money in the assignees' hands, upon condition that it does not break in upon any former dividend. Co. Bt. Laws, 255. — 141. A creditor, by having a claim entered, has the advantage of a dividend being reserved upon his claim, and of being entitled, as soon as his debt is ascertained, and his proof admitted, actually to receive such dividend equal with the rest of the creditors, without the trouble and expence of an application for that purpose to the lord chancellor. Cull. Bt. Laws, 160. — 142. The creditor cannot proceed at law for the credit found by the commissioners. 1 Rose, 395.

(*l*) 1. Assignees are not compellable to refund to mortgagee, rent paid to them after notice by mortgagee to pay to him. 1 Rose, 414. — 2. Where it was referred to a master to settle what was due to the creditors under a commission, and upon payment by the bankrupt, the commission to be superseded; the lord chancellor held, that the creditors were entitled to interest from the date of the master's report, to the day of payment, as in the common case of a reference to the master in a cause, to state what is due for principal and interest. 1 Atk. 214. — 3. A creditor, upon attending to prove, is protected from arrest; and plaintiff will be ordered to discharge him; and all parties will be subjected to costs. 2 V. & B. 375. 2 Rose, 24. — 4. Though the court will favour creditors as much as it can, it must be where they have a superior right to other persons. 1 Atk. 187. — 5. Majority of creditors present at an advertised meeting, may bind the others. Stat. 5 Geo. 2. c. 30. s. 34, 35. — 6. Where a meeting of creditors is properly advertised, and some do not think proper to attend, the majority in value who are present, have a right to bind those who are absent. 1 Atk. 106. — 7. If the majority in value of the creditors who are present, at a meeting duly called for the purpose, refuse to permit the assignees to institute a suit in equity, it is said, that any creditor may, at the peril of costs. Barnardiston's Rep. 30. — 8. Gaoler refusing to shew bankrupt committed to a creditor, forfeits 100*l*. Stat. 5 Geo. 2. c. 30. s. 19. — 9. Creditor swearing falsely forfeits double his debt. 5 Geo. 2. c. 30. s. 29. — 10. A debtor cannot resist payment on the ground that he has notice that the creditor is insolvent, and that he is consequently liable to be called upon again by the assignees, in case it should appear that an act of bankruptcy had been committed. 3 Camp. 151. — 11. Injunction for a debtor upon an interpleading bill. See 1 Rose, 180. 1 Buck. 275.

(*m*) *The following are miscellaneous points relative to commissioners :*

1. Commissioners must act, though in a doubtful case. 15 Ves. 424. — 2. When a person, as of a given character, and under certain circumstances, is brought within the bankrupt laws, the adjudication of the commissioners ought to proceed upon direct evidence before them, that the person is of the character and within the circumstances required; and not upon a deposition incorporating the substance of an affidavit, in which (in another court) those essentials have been attested. 2 Rose, 203. — 3. An appeal lies from the determination of the commissioners, to the great seal, by petition. 1 Atk. 151. 1 Atk. 77. — 4. Though the evidence produced at the first meeting is all *ex parte*, yet it is both the practice and the duty of the commissioners to inquire minutely into the fairness of the petitioning creditor's debt, and the manner in which it arose, as well as the facts of trading and bankruptcy. Cooke, 105. — 5. The jurisdiction of the commissioners is legal and equitable. 1 Atk. 77. — 6. Commissioners doubting, upon just grounds, the fairness of a debt, may, notwithstanding the creditor's oath, reject it, or admit it only as a claim. 1 Atk. 70. Ibid. 221. 11 Ves. 521. — 7. And the creditor's remedy is by petition to the great seal for leave to prove. 2 Ves. 666. — 8. As it likewise is, and not by bill, where a proof has improperly been admitted. Cooke, 130. — 9. Commissioners are not authorized to ex-
punge

wherever found, in his house, or elsewhere, by his or her imprisonment, &c.

And by the st. 13 El. 7. and 1 Jac. 15. if the bankrupt withdraw, and on warning three several times left at the house of his most usual abode for a year last past, do not appear before the commissioners, the major part of them may make him to be proclaimed in the queen's name five market days, near the place of his body, to appear at a time appointed, and if he does not then appear, he shall be out of the queen's protection, and the commissioners may send a warrant to apprehend him.

And by the st. 13 El. 7. if any person conceal him so proclaimed, he shall suffer such fine and imprisonment as the lord chancellor shall think meet.

And by the st. 21 Jac. 19. the major part of the commissioners, or any by their warrant, may break open the house of the bankrupt, and seize his body, &c.

By the st. 4 & 5 Ann. 17. on certificate (u) under the hands and seals of the major part of the commissioners, that such commission is issued, and the party is found a bankrupt, any judge, or justice of peace may grant a warrant to apprehend him, and commit him to the county gaol, of which the gaoler shall forthwith give notice to the commissioners, that they by warrant may remove him before them, &c. Re-vised by the st. 5 Geo. 24.

And if the bankrupt, in 30 days after notice of the commission left at his usual abode, and published in the Gazette (which time the lord chancellor, &c. five days before the time of such surrender may enlarge not exceeding 60 days) do not surrender himself to some of the commissioners, and submit to be examined, he shall suffer as a felon. Enlarged by the st. 5 Geo. 24. and 5 Geo. 2. 30.

punge a proof. 1 Rose, 456. — 10. The course is to petition for an order. 1 Monr. 325. — 11. If the creditors do not direct how the money arising from the bankrupt's estate shall be paid in, the commissioners are to give directions for paying the same. St. 49 Geo. 3. c. 121. s. 5. — 12. They may direct the money paid in to be laid out in exchequer bills. Stat. 49 Geo. 3. c. 121. s. 7. — 13. Commissioners are not authorized to discharge a prisoner. 1 Rose, 260. — 14. They will be controlled when acting beyond their duty, by being charged with costs. 15 Ves. 295. — 15. Where the commissioners took more than 20s. a-piece, and spent large sums in feasting at the expence of the estate, they were removed, a new commission was awarded, and they ordered to pay all costs. 7 Vin. 77. pl. 3. — 16. The commissioners exceeding their authority are liable to an action. 4 Inst. 277. 1 Salk. 548. 2 Blk. 1144. 2 Str. 880. 2 Wils. 382. 3 Keb. 1 Vent. 323. Show. 102. — 17. Hence they are liable in trespass for committing a bankrupt, having made a satisfactory answer. 2 Blk. 1141. — 18. No action lies against commissioners for a commitment bad from a mere formal defect in the warrant. Comb. — 19. Commissioners in bankruptcy have no authority to bind the bankrupt by an adjudication, that upon inspecting the accounts between him and a creditor, he stands indebted to the creditor in so much. If, however, his conduct and demeanor before the commissioners is such, whence an assent upon his part to their estimate and mode of calculation can be inferred, that will furnish evidence of an admission by him that he stands indebted accordingly. The reason of the rule is, that they are not arbitrators of his own choosing, and that he comes before them by compulsion and *in invitum*. 2 M. & S. 265. — 20. Commissioners are disabled from purchasing, whether for themselves or others. 10 Ves. 381. — 21. Commissioners may sue assignees for the costs of defending actions. 16 Ves. 255. — 22. Commissioners in the country can upon no account be allowed more than 20s. 2 Bro. 50.

(a) Commissioners, in their certificate to judge or magistrate, for apprehension of bankrupt, need not mention the cause of their summoning him. 1 Atk. 240. Cooke, 109.

By the st. 5 Geo. 24. any judge, baron, or justice of peace by warrant, &c. may apprehend, &c. *ut supra*. And, if the gaoler suffer an escape, he forfeits 500 l. (o)

(D 5.) And

(o) 1. Bankrupt to surrender at the third meeting, within the forty-two days, or at the enlarged period. Stat. 5 Geo. 2. c. 30. s. 2, 3. — 2. Commissioners are, within the forty-two days, to appoint three meetings for bankrupt's surrender and conformity. Stat. 30. Geo. 2. c. 30. s. 2. — 3. Upon the party being declared bankrupt, commissioners may call upon him to surrender within the allotted time; or upon suspicion that he is embezzling his effects, or leaving the kingdom, may require his immediate appearance before them. 1 Atk. 240. — 4. Chancellor may enlarge time for bankrupt's surrender, not exceeding fifty days. Stat. 5 Geo. 2. c. 30. s. 3. — 5. The grounds for enlarging the time for bankrupt's surrender, are surprise and accident. Cox, 48. — 6. The lord chancellor can only enlarge the time for surrender, for forty-nine days after the expiration of the forty-two days appointed by the commissioners. Amb. 307. — 7. Order for surrendering to pass last examination must be made six days before expiration of forty-second day. 1 Rose, 311. — 8. Upon a due surrender being prevented by commissioners' non-attendance, the court will, upon bankrupt's petition, 10 Ves. 183. appoint another day. 1 Ves. 195. — 9. Court, in its discretion, will order acceptance of surrender after the usual time. 2 Bro. 49. 6 Ves. 445. 12 Ves. 496. — 10. Though assignees object. Ibid. 1 Mad. 248. 2 Rose, 381. — 11. After the expiration of the time allowed by the act for the bankrupt's surrender is expired, an order of the lord chancellor for the commissioners to take the bankrupt's surrender and examination does not protect him from a prosecution, and amounts to no more than a sort of declaration, that the lord chancellor does not see reason to think, that if prosecuted, he would be convicted; and that the opinion of the court was, that the bankrupt had no intention of keeping out of the way fraudulently. 2 Bro. 47. 6 Ves. 445. 14 Ves. 40. 15 Ves. 119. — 12. It is not mandatory upon him; and he, therefore, not guilty of contempt by disobeying it. 14 Ves. 40. 15 Ves. 1. — 13. The omission to surrender must be wilful to make it felony. Amb. 307. — 14. In a case of favourable circumstances the lord chancellor refused to aid a prosecution for felony in not surrendering, by ordering the clerk of the commission to attend at the Old Bailey with the proceedings under the commission, and left the prosecutor to go on in such manner as the law prescribes to prove him a bankrupt and a felon, within the intent and meaning of the act of parliament. 1 Atk. 222. — 15. Commissioners may certify to a judge of the superior courts, or to a justice of the peace, that the party is become bankrupt; and, upon such certificate, the judge, &c., is required to grant his or their warrant for apprehending and committing the bankrupt to gaol. Stat. 5 Geo. 2. c. 30. s. 14. — 16. Upon judges' or magistrates' commitment upon commissioners' certificate of bankruptcy, bankrupt to be removed by commissioners' warrant. Stat. 5 Geo. 2. c. 30. s. 14. — 17. If the summons to the bankrupt be general "to attend," and the certificate to the judge or magistrate to obtain his apprehension, mention only a certain cause for the summons, still the validity of the commitment is not thereby affected. 1 Atk. 240. — 18. If any bankrupt taken under the commissioners' certificate, and the warrant thereon, shall, within the time allowed by the statute, submit to be examined, and in all things conform as if he had surrendered, such bankrupt shall have the same benefit of the statute as if he had voluntarily surrendered. Stat. 5 Geo. 2. c. 30. s. 15. — 19. By the 5 Geo. 2. c. 30. s. 1. the bankrupt is required to disclose and discover all his effects, and estate real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times he hath disposed of, assigned, or transferred any of his goods, wares, merchandizes, monies, or other estate and effects, and all books, papers, and writings relating thereto, of which he was possessed, or in or to which he was anyways interested or entitled, or which any other person had in trust for him or for his use, at any time before or after the issuing of the commission; or whereby he or his family have or may expect any profit, possibility of profit, benefit, or advantage whatsoever; except only such part of his estate and effects as shall have been really and *bonâ fide* sold or disposed of in the way of his trade and dealings, and also such sums of money as shall have been laid out in the ordinary expences of his family. The bankrupt is required upon his examination, to deliver up to the commissioners, all such part of his goods, wares, merchandizes, money, estate, and effects, and all books, papers, and writings relating thereto, as, at the time of his examination, shall be in his possession, custody, or power, the necessary wearing apparel of himself, his wife and children, only excepted. And if he conceal any part of his property to the amount of twenty pounds, with

(D 5.) And of the act of bankruptcy.

After the commission issued, the commissioners, or the major part, ought to examine (*p*), whether he be a bankrupt; for the st. 21 Jac. 19. says, after any person shall by the commissioners, or major part of them, be adjudged, and declared (*q*) a bankrupt.

And by the st. 4 & 5 Ann. 17. the commissioners may call before them any person, who they believe can give account of any act of bankruptcy, and examine him thereto on oath, or otherwise; and if he, having his charges paid or tendered, refuse to appear, or to be sworn, and answer all questions, &c. they may commit him without bail till he submit, &c. Revived by the st. 5 Geo. 24.

Provided, none be obliged to travel above 20 miles so to be examined. Revived by the st. 5 Geo. 24.

(D 6.) For discovery of his estate. By examination of the bankrupt.

By the st. 1 Jac. 15. the major part of the commissioners may examine (*r*) the bankrupt (*s*) on such interrogatories as they shall think meet,

intent to defraud his creditors, he is guilty of felony without benefit of clergy. — 20. The estate of a bankrupt convicted of felony, by secreting his property, is to go to the creditors. Stat. 5 Geo. 2. c. 30. s. 1. — 21. An uncertificated bankrupt going surreptitiously beyond sea, and refusing to assist his assignees in getting in his debts, is guilty of non-conformity, and cannot be discharged under the insolvent debtors' act. 2 Blk. 1138.

(*p*) 1. It seems that the commissioners cannot, under any circumstances, be permitted to receive, as evidence of the act of bankruptcy, an affidavit made before a master. 2 Rose, 559. over-ruling 1 Rose, 298. — 2. And the chancellor will not, upon account of the absence of the witness, order a deposition of an act of bankruptcy under a separate commission, to be received as evidence of an act of bankruptcy under a joint commission afterwards issued. 2 Rose, 559. over-ruling 1 Rose, 298. — 3. If the evidence of the act of bankruptcy amount to the evidence of the person against whom the commission issued, it is not sufficient. 15 Ves. 325. — 4. The certificate of the clerk of the papers, with a deposition of its being signed by him, is the usual proof given of the act of bankruptcy, by lying in prison two months. 4 Mont. 90. — 5. The deposition proving an act of bankruptcy, by departing the realm, should state an intention to delay creditors, or circumstances whence that fact is a necessary inference; and though a departure in embarrassed circumstances is strong evidence of such intention, yet it is not conclusive. 1 Rose, 387. 2 Ves. & Beam. 599. — 6. And note, that equity will not, for the purpose of founding a commission, compel a trader to discover whether he committed an act of bankruptcy; although it will compel a discovery as to the trading. 4 Bro. 434.

(*q*) 1. If sufficient evidence is given to satisfy the minds of the commissioners that the party is a bankrupt, they then declare generally that he was a bankrupt at the time the commission issued. 1 Atk. 71. 1 Atk. 78. 1 Atk. 119. — 2. Notice in the Gazette may be dispensed with, where there is a *bona fide* intention to prosecute the commission. 1 Buck, 81. — 3. Notice in Gazette suspended from swearing to solvency, and denying bankruptcy. 1 Rose, 259. — 4. But operation of the commission in other respects continued. 1 Rose, 336. Vide 17 Ves. 513. 1 V. & B. 350. — 5. Notice stayed, there not being a sufficient act of bankruptcy upon the proceedings. 17 Ves. 414.

(*r*) 1. Commissioners may examine the bankrupt verbally or in writing. Stat. 5 Geo. 2. c. 30. s. 16. — 2. Previous to which, they were restricted to written interrogatories. 5 Mod. 368. 2 Str. 880. — 3. The examination is to be upon oath; unless of a quaker, and then upon affirmation. Stat. 1 Jac. 1. c. 15. s. 6, 7, 9. 5 Geo. 2. c. 30. s. 1. — 4. Formerly, if the bankrupt was in *execution*, the commissioners were obliged to attend him in prison to take his examination; but now, if bankrupt is in

meet, touching his lands, goods, debts, books of account, &c. or his secret grants, or cloining of them, &c. (*l*)

And if he refuse to be examined, or answer fully, they may commit him till he conform. (*u*)

And

execution at the time of his last examination the gaoler or keeper of the prison must, and is indemnified in so doing, bring him up upon commissioners warrant, the same as where he is in custody upon mesne process. Stat. 49 Geo. 3. c. 121. s. 13. — 5. The expences of bringing him up are payable out of the estate. Stat. 5 Geo. 2. c. 30. s. 6. — 6. The commissioners may examine him, touching his lands, tenements, goods, chattels, debts, bills, bonds, books of account, and such other things as may tend to disclose his estate, or his secret grants, conveyances, cloining of his lands, tenements, goods, money, and debts, as they shall think meet. — 7. The commissioners may, of their own authority, enlarge the time for the examination of a bankrupt, who has surrendered within the forty-two days. 2 Burr. 1122. 8 T. R. 475.; or within the enlarged time, which the chancellor may have appointed. 4 Ves. 691. — 8. Generally, the chancellor will not interfere respecting the commissioners mode of conducting the bankrupt's examination. 3 V. & B. 94. — 9. For a latitude of examination conduce to justice. 5 T. R. 17. Dougl. 257. 8 Ves. 531. — 10. Upon extraordinary occasions, however, he will limit it to a particular mode, or to particular points. 1 Atk. 204, 205. — 11. The bankrupt objecting to the commissioners' interrogatory, must demur to it; whereupon the chancellor will decide it by petition. 1 Atk. 199.

(*s*) If the bankrupt is in prison, the assignees are required to appoint one or more persons to attend him from time to time, and to produce to him his books, &c. in order to prepare his last examination; a copy of which he must, upon their application for it, deliver to the assignees or their order, ten days at least before such last examination. 5 Geo. 2. c. 30. s. 6.

(*t*) Admission by bankrupt of a loss of more than $\frac{1}{2}$ at play, will not be expunged, though creditor consented. Cox, 49.

(*u*) 1. A bankrupt not answering to the satisfaction of the majority of the commissioners, their lawful questions, may, by their warrant signed and sealed, be committed to such prison as they may think fit, until he submits himself. Stat. 1 Jac. 1. c. 15. s. 8. 5 Geo. 2. c. 30. s. 16. 2 Burr. 1122. 6 T. R. 118. 1 Ves. 528. 11 Ves. 511. 2 Rose, 217. — 2. Nor is it an excuse, that the answer will subject him to a fine or penalty. 1 At. 196. Cooke, 457. — 3. A positive answer is not therefore necessarily satisfactory. 1 Rose, 407. 2 V. & B. 244. 8 Ves. 528. — 4. And a general answer to a particular question is insufficient. 2 Blk. 919. 2 Burr. 1122. 1215. — 5. Though this results from the tendency of a full answer to criminate him. 1 Rose, 407. — 6. An answer, however, to the best of his remembrance, asserting his inability to answer farther, will do. 5 Wilson, 420. 2 Ch. Ca. 72. Leach, 561. — 7. Commissioners cannot commit for prevarication; since he might still give a full answer at last. 2 Str. 880. — 8. *Quere*, if in committing the bankrupt they ought to be influenced by extrinsic evidence. 1 Buck, 264. — 9. Bankrupt may be committed for not submitting to be examined. Stat. 1 Jac. 1. c. 15. s. 8. — 10. Or for refusing to be sworn. Stat. 1 Jac. 1. c. 15. s. 8. — 11. Or to sign his answers. Stat. 5 Geo. 2. c. 30. s. 16. — 12. Commissioners may compel bankrupt's attendance, notwithstanding he has passed his last examination. 1 Atk. 240. 2 Blk. 1188. — 13. So, refusing to attend assignees after committal, he may be committed by commissioners upon their warrant. Stat. 5 Geo. 2. c. 30. s. 36. — 14. Upon a commitment for not answering either at all or unsatisfactorily, the particular question must be specified in the warrant. Stat. 5 Geo. 2. c. 30. s. 17. — 15. The warrant must pursue the words of the statute; and in this particular the superior courts have been very strict in their construction. 2 Str. 880. Salk. 551. 2 Ld. Rd. 851. — 16. The commissioners' order committing the bankrupt may be made in his absence. 15 Ves. 561. — 17. And though subsequent to, may bear date the day of the examination. 13 Ves. 361. — 18. If, in the order of commitment, the recital of the previous examination incorrectly states the admissions upon which the question was founded, this vitiates. 18 Ves. 237. — 19. A bankrupt being committed by the commissioners for not answering, it appeared from the questions put to him, the commissioners had stated facts of which they were informed by the deposition of the messenger, but the deposition was not set forth in the warrant, nor did it thereby appear to have been read to the bankrupt

at

And if he commit perjury, to the damage of his creditors, to the value of 10*l.*, being convicted, he shall be pilloried, and lose one of his ears.

By the st. 21 Jac. 19. if a bankrupt be found to have fraudulently conveyed away goods or lands to the value of 20*l.*, and do not discover, and, if he can, deliver to the commissioners all the estate and goods so conveyed, and be thereof convicted upon indictment, &c. he shall be pilloried, and lose one ear.

By the st. 4 & 5 Ann. 17. if a bankrupt on examination do not fully and truly discover all his effects, books, &c. and how disposed, and deliver up all in his power, &c. he shall suffer as a felon. So by the st. 3 Geo. 12. a bankrupt against whom a commission issued on or before 26 June 1716, at which time the former act expired. So by the st. 5 Geo. 24. and 5 Geo. 2. 30.

So by the st. 5 Geo. 24. if he conceal, destroy, &c. any of his effects to the value of 20*l.* or any books of account, bonds, &c. of intent to defraud creditors. — So by 5 Geo. 2. 30.

So, if after his certificate he refuse to attend the commissioners, or the court, to make out any debt, &c. having 14 days notice, and 2*s.* 6*d.* *per diem* allowed him, he shall be committed.

(D 7.) Of his wife.

So by the st. 21 Jac. 19. the commissioners may examine on oath the wife of any one found a bankrupt, as to the estate or goods of the bankrupt concealed, or disposed by her, or any other; who refusing to appear, or be examined, or not disclosing the truth, shall forfeit the same penalty as any other person should in the like case.

But before this statute the wife could not be examined by the commissioners against her husband. 1 Brownl. 47.

at the time of his examination. Held that the commitment was substantially insufficient, and that the court could not commit the bankrupt under 5 Geo. 2. c. 30. s. 17. 1 Buck, 264. — 20. A commitment upon two grounds, of which one is unwarrantable, has been held altogether bad. 1 P. Wms. 610. — 21. Though of this there are doubts. 2 Blk. 1141. — 22. A commitment for *misbehaviour* is bad. 2 Blk. 882. 1144. — 23. So for *prevarication*. 2 Str. 880. — 24. So, *till he shall be discharged by due course of law*. 2 Ld. Rd. 851. 2 Str. 880. — 25. So, *till he conforms to our authority*. Bracey's case, 1 Salk. 548. — 26. Upon remanding the bankrupt after a former commitment, there must be a warrant of re-commitment, stating the cause. 2 Rose, 396. 2 Rose, 400. — 27. If commissioners commitment be defective in form, judge upon *habeas corpus* to re-commit. Stat 5 Geo. 2. c. 30. s. 18. — 28. *Habeas corpus* is the appropriate mode of discharging the bankrupt from commitment by commissioners. Dick, 67. 11 Ves. 425. 1 Rose, 407. — 29. And the court will not go out of the return to the writ. 5 Mod. 368. 1 Rose, 407. 11 Ves. 511. — 30. If the facts did not warrant the commitment, the remedy is by action. — 31. Petition is not the appropriate course for obtaining bankrupt's discharge from commitment by commissioners. 1 Atk. 240. 8 Ves. 330. 10 Ves. 106. 18 Ves. 237. — 32. Order, upon petition of bankrupt committed by commissioners, to bring him again before them. 18 Ves. 294. — 33. A party committed by commissioners of bankrupt, must send them word when he will submit and answer. 1 T. R. 654. — 34. Whereupon they must appoint a meeting, and at the expence of the estate. 2 Bro. 48.

(D 8.) Or of others.

So by the st. 13 El. 7. the commissioners may send (*x*) for any persons suspected to have any goods or debts of the bankrupt, or to be indebted to him, and may examine (*y*) them on oath, or otherwise, about the truth and certainty thereof: and if any refuse to be sworn, or disclose not the whole truth (*z*), on proof thereof before the commissioners by witness or otherwise, he shall forfeit double the value of the goods, or debts concealed, to be levied by the commissioners on his or their lands and goods, &c. for the benefit of the creditors, in the same manner as they may order the lands or goods of the bankrupt himself.

And by the st. 1 Jac. 15. the commissioners (*a*) may, by warrant (*b*), &c. commit the party, refusing to appear, or to be sworn, and answer such interrogatories (*c*) as shall be ministered to him (*d*), without bail (*e*), ill he submit to be examined, &c. — So by the st. 5 Geo. 24. as to acts of bankruptcy.

And such person convicted of wilful perjury, &c. or any convicted of suborning them, shall suffer such punishment concerning perjury as in 5 El. 9. (*f*)

Provided the commissioners allow the witnesses sent for, such costs as they think fit. (*g*) And by the st. 5 Geo. 24. they are not obliged to go above 20 miles. (*i*)

(*x*) So they may examine any person present at their meeting. 5 G. 2. c. 30. s. 16.

(*y*) 1. Chancellor will not interfere with the commissioners' mode of examining a witness. 9 Ves. 513. — 2. It is an indulgence to allow witnesses examined by commissioners the assistance of counsel; and is in commissioners' discretion. 1 Atk. 204.

(*z*) Commissioners of their own authority may examine and make parties confess the infirmity of their title. 13 Ves. 189

(*a*) 1. Order enforcing attendance of witnesses upon commissioners, will be made upon disobedience to their summons. 6 Ves. 781. 11 Ves. 8. 14 Ves. 451. 17 Ves. 379. 1 Rose, 39. 1 V. & B. 74. 2 Rose, 330. 1 Buck, 258. — 2. Order for attendance of witnesses upon opening the commission, limited to the proof of some specific fact. 1 V. & B. 41. — 3. Leaving order where witness resided when summoned, ordered to be good service. 1 Buck, 258. — 4. Commissioners order upon bankrupt, passed his examination and certificated, to attend, enforced. 14 Ves. 449.

(*b*) 1. In determining to grant the warrant, the commissioners must act together, though they may afterwards sign separately. 8 East, 319. — 2. Their order to make it out must be taken to include their direction as to the persons to whom it should be directed. 8 East, 319. — 3. It may issue upon disobedience to the first summons. 8 East, 319. 16 Ves. 236.

(*c*) 1. Commissioners may commit a witness refusing to sign his answer, not having a reasonable objection. Stat. 5 Geo. 2. c. 30. s. 16. — 2. So for disobeying their first summons. 8 East, 319. over-ruling 2 Blk. 1035.

(*d*) 1. A witness must give an account of what he knows of bankrupt's effects, as well before as after the bankruptcy. 1 Ld. Raym. 99; see 3 Keb. 837. — 2. But he is not bound to answer any thing which tends to criminate him. 5 Mod. 509. Comb. 391. — 3. Commissioners may require witness to sign his answers. Stat. 5 G. 2. c. 30. s. 16.

(*e*) A party committed by commissioners is entitled to a *habeas corpus*. St. 5 G. 2. c. 30. s. 18. Dick, 479.

(*f*) 1 Jac. 1. c. 15. s. 9. 11. 5 G. 2. c. 30. s. 29.

(*g*) 1. Upon commissioners summoning a witness, his expences need not be tendered or even ascertained beforehand; though want of means would prevent an attachment for non-attendance. 2 Rose, 75. 2 Rose, 345. 1 Mer. 188. — 2. Therefore notwithstanding, they may arrest him for disobedience. 8 East, 319. — 3. Witnesses are entitled to their costs and charges. Stat. 1 Jac. 1. c. 15. s. 11. — 4. And summoned, though by a *parol* order of commissioners, may have *assumpsit* for costs directed by them to be paid. 1 Esp. 64.

By the st. 4 & 5 Ann. 17. in case the bankrupt do not surrender himself, and conform, &c. all persons, who have accepted any trust, or concealed any real or personal estate of the bankrupt, shall in 30 days after notice of the commission, discover such trust and estate in writing to one of the commissioners, and submit to be examined, &c. or forfeit 100*l.* and double the value of the estate concealed, to be recovered by the assignees for the benefit of the creditors, with costs, &c. And any person voluntarily discovering, &c. in 60 days after the time allowed to the bankrupt to surrender, shall have 3*l.* per cent. from the assignees, of the neat proceed of what shall be recovered by such discovery. — Revived by the st. 5 Geo. 24.

But a commitment, till he conform to their authority, is void. R. 1 Sal. 348.

Or, till discharged by due course of law. R. 1 Sal. 351.

(D 9.) By seizure of his effects.

By the st. 13 El. 7. if any detain goods, lands, or debts of a bankrupt fraudulently, &c. he shall forfeit double the value of them, to be levied in the same manner as the forfeiture for concealing such goods, &c. on examination, &c. and to be employed for the benefit of the creditors, or if they be paid, then a moiety to the queen, and a moiety to the poor, &c.

And by the st. 21 Jac. 19. (*k*) the commissioners or any by their warrant may break open the house (*l*), chambers, warehouse, shop, doors, or trunks of the bankrupt, and seize his goods, money or other estate.

So by the st. 4 & 5 Ann. 17. on certificate from the commissioners, of the commission, and that the party is found a bankrupt, any judge or justice of peace may grant a warrant to seize any goods, books, writings, or other real or personal estate of the bankrupt. — So by the st. 5 Geo. 24.

And by the st. 5 Ann. 22. if the bankrupt, or any other by his consent or privity, remove, conceal, destroy, or embezzle any goods or effects, whereof the bankrupt, or any in trust for him, is possessed, to the value of 20*l.* or any books of account, writings, &c. of intent to defraud his creditors, such bankrupt shall suffer as a felon. — So by the st. 5 Geo. 24. and 5 Geo. 2. 30.

(*i*) 1. Witnesses summoned to attend commissioners of bankrupt, are privileged from arrest, during their attendance, *etiam exundo et redeundo*. 2 Blk. 1142. — 2. Though summoned upon their own importunity. 1 Atk. 54. — 3. Or even though not summoned; at least *morando et redeundo*. 1 V. & B. 316.

(*k*) 5 G. 2. c. 30. s. 14.

(*l*) 1. They cannot break open any other than the bankrupt's house to search his for goods. 2 Show. 247. — 2. And where a messenger, under commissioners' warrant, attempted to seize the bankrupt's goods in the possession of the master of a ship, who refused to deliver them, lord chancellor doubted whether he could make an order in aid of their warrant. He, however, made an order for delivery of goods, upon payment of freight and indemnifying master against bill of lading sent to consignees. Molloy, 255. 2 Eq. Ca. Abr. 98.

(D 10.) For

(D 10.) For disposal of his estate. What lands and goods.
All his real estate.

By the st. 13 El. 7. the major part of the commissioners have full power by their discretion to take order with all (*m*) a bankrupt's lands(ⁿ),
tenements,

(*m*) These are *general rules* upon the question what passes under the commission;—
1. Every description of personal property to which the bankrupt is legally or equitably entitled at the time of the bankruptcy, or to which he may become entitled previous to obtaining his certificate, may be assigned by the commissioners. 34 & 35 Hen. 8. c. 4. s. 1. 13 Eliz. c. 7. s. 2 & 11. 1 Jac. 1. c. 15. s. 13. 21 Jac. 1. c. 19. 5 Geo. 2. c. 30. — 2. Hence all interests, legal and equitable, pass under the assignment. 9 Ves. 83. 1 V. & B. 547. — 3. So whatever possibility of interest the bankrupt is entitled to in his own right, may be assigned by the commissioners. 5 P. Wms. 132. — 4. And in fine, every species of property whereof by possibility a profit may be made, acquired by a bankrupt before his certificate, passes to his assignees. 3 Smith, 58. 7 East, 53. 3 B. & P. 565. — 5. Therefore, a right to bring a real action. 2 H. B. 444. — 6. Devise to such of the children of A. as should be living at his death. A. had issue, amongst others, B. who became bankrupt, and obtained his certificate; then A. died; and assignees were held entitled to B.'s interest. 5 P. Wms. 132. — 7. But where, after the bankrupt obtains his certificate, an estate descends to him as heir at law, it is not such a possibility as can be assigned by the commissioners: there must be a *persona designata*, it must be a possibility that can be assigned or released; such as the bankrupt can disclose upon his examination. Amb. 394. These are *miscellaneous points*. — 8. Where a chattel is made to order, the property therein is not vested in the (*quasi*) vendee, until finished and delivered, though he has paid for it. Therefore, upon his bankruptcy previous to these, it does not pass. 1 Taunt. 518. — 9. If a trader draw an order for payment of a sum of money out of a certain fund, and pay it to a creditor, who deposits the order with the payee, and before the order is payable the trader become a bankrupt; the money does not pass, but must be appropriated in payment of the order. Row v. Dawson, 1 Ves. 331. — 10. The assignees cannot, in trover, recover from a creditor the amount received under a check delivered to him by the bankrupt since the bankruptcy. Mathew v. Sherwell, 2 Taunt. 439. — 11. An agreement for a lease made for bankrupt's personal accommodation, does not pass. 2 B. & B. 9. — 12. An assignee under a commission is, *comme semble*, entitled to have the benefit of a covenant for renewal of a lease at the end of a term. 2 Vern. 194, contra. 2 Freem. 183. 2 H. B. 444, accord. — 13. If a mortgage-deed contains a covenant for further assurance, the mortgagee may retain his security against the assignees. 3 Bro. 594. 2 Bro. 652. — 14. The right to money payable by instalments for taking into partnership, passes, though partnership determined by the bankruptcy. Swanst. 85. — 15. The right of action for money lost at play, passes. 2 Vcs. 514. 2 H. B. 308. — 16. A power does not pass. Lord Townsend v. Windham. — 17. The commissioners may assign a lease granted to the bankrupt, in which there is a proviso, that the lessee, his executors or administrators, shall not assign without the lessor's consent in writing. 2 Eq. Ca. Abr. 100. Amb. 480. 2 Atk. 219; vide 12 Ves. 504. 5 M. & S. 353. — 18. Funded property limited to the bankrupt as unalienable, if given for life, with no limitation over upon bankruptcy, passes. 1 Rose, 197. 18 Ves. 429. — 19. Property limited over upon bankruptcy, does not pass. 1 Rose, 197. 18 Ves. 429. — 20. If an estate be settled upon bankrupt for life, with other intervening uses, remainder to himself in fee, with power to change the uses, and he afterwards become bankrupt, the remainder in fee vests in the assignees, and his power of revocation is gone. Lofft. 71. — 21. Where a trader pledged a lease as a security for a sum of money lent to him, and afterwards became bankrupt; the court said they had nothing to do but to supply the legal formalities, and ordered the estate to be sold for the payment of the money. 1 Bro. 269. and cases there cited. 9 Vcs. 115. 11 Ves. 398. ib. 403. — 22. A lease is deposited as a security, but no assignment is executed: *semble*, that the equitable interest of the pledge is not of such a nature as to reduce the estate of the pledgor to a naked trust, which would not pass to his assignees. 5 Esp. 105. — 23. A policy of insurance, effected by a trader on his own life, passes to his assignees, unless they expressly renounce their claim to it. 1 Campb. 487. — 24. A share in a ship passes,

tenements, and hereditaments, as well copy as freehold, which he shall have in his own right before he became a bankrupt.

And

passes, without being charged in respect of disbursements by the other part-owners. 2 Rose, 76. — 25. Assignees cannot have trover for a ship of which bankrupt was never the registered owner, although defendant claims under the bankrupt. Stark. 177. — 26. A right to compensation under a dock act passes. 17 Ves. 343. — 27. A debtor, after an act of bankruptcy, indorses to his creditor bills of lading, as a security. The creditor insures in his own name, and on a loss, recovers against the underwriter, by averring the interest in the bankrupt's assignees. The assignees are not entitled to the money so recovered. 4 Taunt. 380. — 28. Under the bankruptcy of an executor and trustee directed by the will to carry on a trade, and a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund are not liable. 10 Ves. 100. — 29. Property obtained by fraud, and which can be distinguished, does not pass. 1 M. & S. 517. — 30. A., upon false pretences, obtains a bill from B., and his assignees receive the amount. This is money had and received by the assignees to B.'s use. Peake, 111; and see 12 East, 656. — 31. Effects acquired between the signing and allowance of the certificate, pass; thus, a legacy. 2 Burr. 716. — 32. Future property the estate (under a second commission) not paying 15s. in the pound, does not pass. 1 Rose, 452. — 33. If the statute of limitations is pleadable against a bankrupt, his assignees may be barred by it; and the time is to be computed from the date of the original cause of action, and not from the date of the commissioners' assignment. 1 Stra. 555. 3 P.Wms. 143. Comb. 70. — 34. A trader assigned his whole estate in trust for his creditors, reserving to himself a power of revocation on a certain event. He afterwards commits an act of bankruptcy, upon which a commission issues. Held, that the assignment under the commission was not tantamount to a revocation as by the trader. 5 T. R. 530. — 35. Certain stock standing in the name of the bankrupt, the dividends of which had not been claimed, was, under the 56th Geo. 3. c. 60. transferred to the commissioners for the reduction of the national debt. The assignee of the bankrupt, by petition under the act, claimed the stock as part of the bankrupt's effects. Another person, by petition, claimed the stock, insisting that the bankrupt was a trustee for him. A reference was directed to the master, to ascertain whose stock it was, and in the mean time the stock was directed to be transferred into the name of the accountant general. 5 Mad. 28. — 36. An action of trover cannot be maintained by the assignees of a bankrupt, to recover bills of exchange from the holder, who drew them with a knowledge of the bankrupt's insolvency, and after compelling such bankrupt to sign, induced his creditors, who were not aware of his circumstances, to accept them. 1 B. Moore, 281. — 37. A., in London, agrees to consign goods to B. & Co. at Hamburg, on a commission *del credere*, to receive the proceeds through the hands of C. their partner in London, who is to make advances to A. and repay himself out of the proceeds; B. & Co. purchase bills at Hamburg, drawn on D. in London, indorsed to themselves, and which they indorse and remit to C. as part of the proceeds, advising A. thereof, and desiring him to give them credit for them when duly honoured. The bills are accepted by D. but never indorsed over to A., and before they became due, D. stops payment. Held, that the jury were justified in considering that the bills were sent to the account, and at the risk, not of A., but of C.; and therefore A. having become bankrupt, that his assignees were entitled to recover the balance of the proceeds from C. 2 Mars. 460. 7 Taunt. 164. — 38. Where a trader advanced half a fine for the renewal of a lease, and took from the lessee a promissory note to repay the money, unless she should by will give the leasehold estate to one of his children, and the lessee accordingly bequeathed the estate to one of the trader's children; but before the death of the lessee, the trader became a bankrupt, and after her death the assignees of the bankrupt filed a bill against the child of the bankrupt. Held, that, if it was money advanced without a lien, it might be dangerous to give it to the assignees; but that as far as the money advanced was a lien, the father procured an interest, which must go to his assignees. 1 Bro. 160.

(n) 1. Property in Scotland passes. 1 Rose, 462. 3 V. & B. 100; as well real, 9 Ves. 81, as personal. 2 Rose, 291. 3 V. & B. 100. — 2. Personal property abroad, in Ireland, for example, passes. Good. 114. 1 H. B. 132. 9 Ves. 86. 1 H. B. 694. 4 T. R. 182. 2 H. B. 402. contradicting Cooke, 300. Vide Cooke, 297. Dougl. 161. — 3. Real property does not. Cooke, 297; see Dougl. 161. — 4. Money owing out of England (as in the plantations) to a bankrupt, may be attached by the law of the

And therefore the commissioners may sell (o) all lands and tenements, which the bankrupt had at the time of his bankruptcy in fee, for life, or for years.

So, all rents, annuities, offices, (p) &c. (q)

So, all copyhold estates; for they are within all the statutes of bankrupts. R. Cro. Car. 550. Vide Copyhold, (N.)

So a reversion, or remainder, as well as lands in possession.

So any future interest: as, a term to commence *in futuro*.

(D 11.) Though a joint purchaser with his wife, &c. (r.)

So by the st. 13 El. 7. the commissioners may sell all lands, tenements, and hereditaments, which the bankrupt shall have purchased for money, &c. jointly with his wife, children, or child, for his own use, or for such use or interest as he might lawfully depart withal.

Yet, if a purchase in the name of himself and his wife, and son, was before his trading, the commissioners cannot sell it. R. per 3 J. Cro. Car. 550.

So by the st. 13 El. 7. the commissioners may sell all lands, &c. purchased with any person to the secret use of the bankrupt.

So, if the bankrupt be a joint-tenant in fee, for life, or years, the commissioners may sell a moiety.

If he be seized in right of his wife, they may sell during the coverture. (s)

the place, after the bankruptcy, for a debt due before. Dougl. 170. — 5. If, after the assignment of a bankrupt's estate, a creditor knowing it, and residing in England, attach the money of the bankrupt abroad, the assignees may recover it. 1 H. Bl. 665. 4 T. R. 182. 2 H. Bl. 402.

(o) 1. As to legal operation of a sale or assignment by commissioners.—It has not the effect of a voluntary transfer of stock under a covenant. 1 V. & B. 179.—2. And held not to work a forfeiture under a clause in a will against alienation. Cooper, 259.—3. But where an annuity was given by will to a trader for life, payable to him only, upon his own receipt and no other, and to cease immediately upon alienation; held, that it ceased by the bankruptcy, and the bargain and sale of the trader's estate. 3 Ves. 149. 6 T. R. 684.

(p) 1. All offices touching or concerning the administration or execution of justice, are not saleable by the commissioners, as the stat. 5 & 6 Edw. 6. c. 16. expressly prohibits the sale of such offices. But all other offices of inheritance, and for terms of years, are.—2. The office of serjeant at mace of the city of London has been held to be within the meaning of the stat. 5 & 6 Edw. 6. although it was purchased for a sum of money, and held *quamdiu se bene gesserit*, for it concerns the administration of justice. 1 Atk. 212.—3. The place of a jew-broker in the city of London is not a saleable office. Amb. 89.—4. Where the office is only of police, such as that of the under-marshal of the city of London, it is saleable by the commissioners. 1 Atk. 210. 215. Amb. 73.—5. The place of one of the sworn clerks of the six clerks office, is not assignable. 1 Atk. 212.—6. A gentleman pensioner becoming bankrupt, was ordered to resign to the nominee of the assignees. Cooke, 283.—7. Neither the full nor half-pay of an officer in the army, navy, or marines, is assignable. Cooke, 284. 3 T. R. 681. 1 H. B. 627. 4 T. R. 248. 2 Anst. 533.; but see 2 Blk. 1137.

(q) 1. Where a bankrupt is entitled to an advowson, or to a right of next presentation to a living, the commissioners may sell it. But if, at the time of sale, the church be void, the bankrupt shall present. 1 Burn's Ecc. L. 125.—2. If a clergyman become bankrupt, his living is liable to a sequestration, and the proceeds are distributable amongst his creditors. 1 Atk. 200.

(r) Vide *infra*, (G) (O).

(s) Lofft, 71.

(D 12.) Though

(D 12.) Though conveyed to his children, or trustees.

So by the st. 1 Jac. 15. the commissioners may sell all lands, &c. offices, &c. goods, chattels, and debts, which such person who shall become bankrupt, shall have conveyed, or cause to be conveyed to any of his children, or other person, or into any other men's names, as amply as if such bankrupt, at the time of the bankruptcy, had been actually seised, or possessed in his own name, of the like interest.

So if they are conveyed before his bankruptcy, in consideration of marriage, to the use of himself and his wife; though the wife is not named by the stat. for she is within the intent. R. Sti. 289.

(D 13.) Though seised only in tail.

So by the st. 21 Jac. 19. the commissioners may sell, &c. all lands, &c. whereof the bankrupt is seised in tail, in possession, reversion, or remainder, whereof no reversion or remainder is in the king of the gift of the king, &c. which shall be good against issues in tail, and all others, whom the bankrupt might bar of any remainder, title, possibility, &c. by a common recovery. (t)

So they may sell an estate, which the bankrupt has, to commence upon a contingency.

(D 14.) Though he has only an equity of redemption.

So by the st. 21 Jac. 19. if the bankrupt have conveyed lands, &c. goods, &c. on condition, or under power of redemption, the commissioners may before the time of performance of the condition, under their hands and seals appoint a person to make tender of payment or performance, according to the nature of the condition. And after such tender, &c. the commissioners may sell such lands, goods, &c. for the benefit of the creditors, as any other of the bankrupt's estate.

(D 15.) Though it descends after his bankruptcy.

So by the st. 13 El. 7. the commissioners may sell all lands free or copy, fees, goods, &c. purchased (u), or which shall descend, or by any means come to the bankrupt after his being declared a bankrupt, at any time before the debts to the creditors be fully satisfied, or agreed for.

(D 16.) All goods and debts.

So by the st. 13 El. 7. the commissioners may sell all money (x), goods, chattels, merchandizes, wares, and debts of the bankrupt, wherever found.

And by the st. 1 Jac. 15. the commissioners may grant, and assign any debts due to the bankrupt, or to be due, from what person, or in

(t) 1. If a tenant in tail mortgage an estate for years, and no recovery is suffered, and he become a bankrupt and die, the assignee is entitled to the estate clear of the mortgage. 1 Wils. 276. — 2. But if a tenant in tail make a mortgage, with a covenant for further assurance, and become bankrupt; his assignees are bound by the covenant, although no recovery be suffered. Cited 2 Bro. 652. 3 Bro. 595.

(u) And therefore lands devised. Good. 88.

(x) Lord Chancellor may order stock in the public funds, belonging to bankrupts, and standing in their names, to be transferred to assignees. Stat. 36 Geo. 3. c. 90.

s. 2.

what

what manner soever, to the benefit of the creditors; which assignment shall vest the property of such debt in the assignee, as fully as if the bond, &c. were made to such assignee, so that the bankrupt shall not afterwards recover release, or discharge the same, nor shall it be attached as a debt of the bankrupt.

And therefore the commissioners may sell all the goods of the bankrupt, though he sold them *bonâ fide* after his bankruptcy, and before the commission awarded. Vide ante, (C 9.)

Though he sold them in market overt. Per Twisd. 1 Lev. 174. 1 Sid. 272.

A fortiori, goods sold by the bankrupt after the commission, before seizure. R. Mo. 594.

Though the bankrupt pay his money to any creditor for a just debt. R. 2 Co. 25. b.

So they may sell his goods in Ireland.

They may sell monies due to the bankrupt upon a judgment. Jon. 215.

And judgment may be entered upon a *scire facias*, after verdict against the terretenant, at the request of the assignee, without a new *scire facias* by him. 5 Mod. 88.

So, an heriot, relief, &c. due to the bankrupt.

So a debt upon a bond to A. as trustee for the bankrupt. R. Pal. 505.

So they shall have an equity of redemption, which the bankrupt had. 2 Ver. 97.

So a legacy given to the bankrupt, for which he had a decree. R. 2 Ver. 433. (y)

So, they may sell goods of the bankrupt forfeited, and seized by a *capias utlagatum* after the bankruptcy, and before the commission; for a bankrupt shall not defeat his creditors by his act or default. R. 1 Sal. 109. R. cont. in the exchequer, Hill. 6 Geo.

So by the st. 5 Geo. 2. 30. the goods of a bankrupt, being a felon, shall go among the creditors.

(D 17.) Though he has only the disposition by consent of the owners, &c.

And by the st. 21 Jac. 19. the commissioners may sell all goods, whereof the bankrupt shall be reputed owner, and with the consent of the true owner, take upon him the sale and disposition, though formerly conveyed by the bankrupt to such true owner for valuable consideration. (z)

And

(y) Legacy falling to a bankrupt before allowance of his certificate, by the testator's death, pending an unfounded petition to stay it, goes to his assignees, unless the petition was presented with that objection. 19 Ves. 208.

(z) 1. The enacting part of sect. 11. stat. 21. Jac. 1. c. 19. is not restrained by the preamble, but extends to goods of a third person, which he permits a trader, who afterwards becomes bankrupt, to be in possession of, and to sell as his own. Cowp. 232. — 2. Though formerly this was *verata questio*. 1 P. Wms. 318. 1 P. Wms. 514. 1 Atk. 158. 1 Ves. 239. 1 Atk. 165. — 3. But such goods only pass as the bankrupt had in his possession at the time of his bankruptcy. 15 East, 21. — 4. And the possession must be with the owner's consent; not adverse. 1 Ves. 243. — 5. Nor is a naked possession, with neither the reality nor semblance of a power of disposition, sufficient. 1 Ves. 243. — 6. Utensils of trade let

And all lands, goods, &c. extended after his becoming a bankrupt, on pretence of his being accomptant, or indebted to the king, if upon examination

to a trader at a yearly rent, pass to his assignees, unless there be a usage of trade for such articles to be let out to traders. 9 East, 215. Vide 1 B. & P. 83. Cooke, 353. — 7. A person who kept a coffee-house gave a warrant of attorney to her creditor for 800*l.* under which he entered up judgment, and took her goods in execution. They were valued by the sheriff at 337*l.* 13*s.* 6*d.* and a bill of sale made out at that price to J. S. the plaintiff's brother, in trust for him. Afterwards, by articles of agreement between J. S., the plaintiff and the bankrupt, the plaintiff let the goods of the bankrupt, at a yearly rental for four years: the bankrupt continued in possession beyond four years, and until they were seized under the commission; they pass. 1 B. & P. 82. — 8. But the statute does not affect the freehold, or any article annexed thereto. 9 East, 215. 1 Atk. 168. 1 Ves. 352. 7 T. R. 228. 11 Ves. 407. — 9. A condition annexed to the sale of standing timber, that on the vendee becoming bankrupt before payment of the price, the vendor might retake the same, is void, if the bankrupt, when he becomes such, had the sale, order or disposition thereof. 2 Taunt. 176. — 10. Possession must accompany an absolute sale of personalty. 2 T. R. 587. 2 T. R. 594. 1 Atk. 163. 1 Ves. 348. 1 Ves. 352. 1 B. & P. 83. Cooke, 353. 1 B. & P. 82. — 11. Where by the terms (which were notorious in the neighbourhood) of a *bona fide* sale, the vendor was to remain in possession for three months, held that the property did not pass under his bankruptcy before the time expired. 1 M. & S. 335. — 12. A trader had committed an act of bankruptcy; goods were afterwards sent by a vendor to a particular inn as ordered, whence they were forwarded to a packer's, pursuant to a general order of the trader to send all goods directed to him there; the packer, ignorant of the act of bankruptcy, booked them to his account, and opened them to ascertain what they were. The assignees are entitled. 3 B. & P. 469. — 13. In the case of a bulky commodity, a symbolical delivery, as delivering the key of the warehouse containing it, is sufficient. 1 Atk. 170. 7 T. R. 67. — 14. And the same holds where, from necessity, a symbolical delivery has been made; as, where a ship at sea has been mortgaged, and the grand bill of sale delivered to the mortgagee. But it seems, that if there are any documents relative to the property in the vendor's possession, with knowledge of the vendee, by which he might be enabled to impose himself upon third persons as owner, these must be delivered to the vendee. 2 T. R. 462. — 15. A custom in the trade for the purchaser to leave the article in the seller's warehouse, undistinguished by mark of separation from articles of the same kind, will not prevent its passing. 5 Taunt. 487. — 16. The property in goods sent by wholesale dealers to a shop-keeper upon sale or return, passes. Livesay v. Hood, 2 Camp. 83. — 17. Stat. 21 Jac. 1. c. 19. not applicable to bills at a banker's. 1 Rose, 232. — 18. Nor to goods left in trust to sell. 1 P. Wms. 314. — 19. A., a trader and officer in the East India Company's service, assigned his privilege of shipping from India to England to B. for a valuable consideration; and in order to evade the bye-laws of the company, prohibiting such assignment, the goods were shipped, entered, warehoused, and sold by the Company in A.'s name, and the proceeds carried to his account; but before A. received those proceeds from the Company, he became bankrupt. The assignees are entitled to them. 7 T. R. 228. — 20. When a testator directed, that in case his son should carry on the testator's trade for the benefit of himself and his mother, his lease and furniture should not be sold, but that the trustees should permit the widow and children to reside therein, and have the use of it; and the widow and son carried on the trade, and became bankrupt. Held, that the furniture, &c. was not in the order and disposition of the bankrupts. 2 Rose, 331. — 21. Shares held by A. as trustee for B. who appoints him residuary legatee, not within the statute. 1 Sch. & Lef. 328. — 22. If, previous to marriage, the wife's stock in trade, furniture, or other property, be assigned to a trustee for her separate use, and to enable her to carry on her separate trade, neither the property assigned (though not scheduled) nor its produce, will pass under the husband's bankruptcy, unless, 1. the assignment was colourable; 2. or the husband had the order and disposition of the goods, with the consent, express or implied, of the real owner, the trustee. 3 T. R. 618. Ibid, 620, n. — 23. A widow with children, before her second marriage, conveyed her household furniture to a trustee in trust, to suffer A., her second husband, to have the enjoyment of them, upon condition that he should pay 800*l.* by yearly instalments of 100*l.* a-year, for the use of them. Part of the instalments only were paid; A. became bankrupt; the night before the act of bankruptcy, the trustee took possession. The goods pass to the assignees. 8 T. R. 82. — 24. Where a chose in action is assigned, all the cases agree

examination by the commissioners on oath it be found, such debt be due to such accomptant, or debtor on a contract not originally made between

agree that the security, if any, must be delivered over to the assignee. — 25. Operation of stat. 21 Jac. 1. c. 19. s. 10, 11. prevented in the case of debts (which are within the statute, 6 Ves. 128. 9 Ves. 407. 11 Ves. 7. 14 Ves. 186) by assignment, delivery of the security, if any, and notice to debtor. 9 Ves. 410. — 26. Hence, if a bond is assigned, it must not only be delivered to the assignee, but notice should be given to the debtor of the assignment. 1 Ves. 348. 1 Atk. 171. — 27. But in the case of book debts, it is sufficient to give notice only, as there is nothing that can be delivered. 1 Ves. 348. 1 Atk. 171. — 28. Under a *fi. fa.* against a trader, the sheriff (of Cumberland) makes out a warrant, directed to the trader's, shopman, and another person, by whom the business is conducted in the usual way, but without the interference of the trader, who, upon the following day, commits an act of bankruptcy. This is a continuation of the possession of the master, and the goods pass in his assignees. *Jackson v. Irvin*, 2 Camp. 48. — 29. The printer and publisher of a newspaper assigned his interest therein to a creditor as a security, but continued to print and publish as before, and no affidavit of the change of interest was delivered to the commissioners of stamps. The printer became bankrupt. The right to the paper passed. 2 N. R. 67. — 30. If one of two partners has possession of partnership property, and the one out of possession transfers his share, the purchaser must notify the transfer to the other partner, otherwise the share transferred will, on the bankruptcy of the vendor, pass under the stat. 21 Jac. 1. c. 19, as being in the bankrupt's visible ownership with the owner's consent. 4 M. & S. 247. — 31. Where one partner mortgages to another, or to a trustee for him, all his share of the partnership, the deed of copartnership must be delivered up, and notice given to the book debtors. 1 Ves. 348. 1 Atk. 171. — 32. So, where one partner, upon retiring, leases the stock, notice is necessary. 9 East, 215. — 33. For the stat. 21 Jac. 1. c. 19. is applicable to property left by retiring with ostensible partner. 2 V. & B. 173. — 34. Quære, whether the stat. 21 Jac. 1. is applicable to property left by dormant in possession of ostensible partner. 2 Rose, 252. 256. 1 Buck, 48. See 6 Ves. 747. — 35. The share of a secret partner in the joint stock in trade, being in the possession of an apparent partner, and the sole ostensible trader, is not liable to the bankruptcy of the latter, as being within the meaning or mischief of the 21 Jac. 1. c. 19. the bankrupt having such an interest and qualified property in the secret partner's share, as to destroy the essential requisites of a true and independent ownership on the one hand, and of a fraudulent and reputed ownership on the other. 1 Price, 119. — 36. Goods bought by a bankrupt and two others, and left in the temporary custody of the bankrupt until an opportunity offered for the sale of them, is not a possession within the statute; there is an undivided property of which they are tenants in common; there must be a possession of the goods in one or other of them, and the possession of one is the possession of all. 1 Atk. 185. — 37. Where a trader assigned a ship and the policy of insurance upon it, and covenanted to keep up the insurance for the benefit of the assignee, and left the policy in the hands of the broker, who was a creditor of the trader, as a pledge for his debt; upon the trader's becoming a bankrupt, the assignees paid the broker's debt, and obtained possession of the policy. Held, that the assignees were not entitled to the policy, as the leaving was not a possession within the statute. 1 Bro. 125. 2 T. Rep. 491. — 38. The right upon a policy, in owner's name, made upon property left within the statute, does not pass. 1 Buck, 149. — 39. Quære, whether shares of a ship, not at sea, are within the statute. 1 Ves. jun. 163. — 40. In the case of ships at sea and their cargoes, of which an absolute delivery of possession cannot be made, it will be sufficient if the proper documents and muniments are delivered, that the purchaser may be enabled to reduce the property into possession upon the arrival of the ship in port. 1 Atk. 160. — 41. Where a ship at sea is sold, it seems to be the vendee's duty to write by the earliest opportunity, to the captain, who will thereupon be accounted his agent, and thus he will have possessed himself of the property. If he lets an opportunity pass by without writing, and in the meantime the vendor becomes bankrupt, the ship will be considered as property in his possession, as visible owner with the owner's consent, and pass accordingly under the 21 Jac. 1. c. 19. 4 M. & S. 248. — 42. A bill of sale of a ship at sea is executed, a policy on the ship and cargo is placed in the vendee's hands, and the bills of lading making the cargo deliverable to the vendor or assigns, are, upon the ship's arrival, indorsed to the vendee, who is made acquainted therewith. The vendor directs the captain to proceed to a foreign port, dispose of the cargo, and remit the proceeds to the vendee, without acquainting him that the ship and cargo were sold. The captain

tween him and the bankrupt, but made with, or in trust for some other person.

So, goods taken in execution after an act of bankruptcy, though the writ bears *teste* before. Semb. 1 Lev. 173.

So a judgment obtained by a creditor after an act of bankruptcy shall be avoided.

So, by the st. 21 Jac. 19. if the bankrupt had granted, or pledged his goods, &c. for payment of money, the commissioners may pay or tender the money, and then sell the goods.

Yet, if the goods of a bankrupt are seized in execution after the bankruptcy, and sold by the sheriff, the commissioners cannot assign the money raised by the sale, but they must assign the goods themselves. R. 3 Lev. 192.

So, if goods are taken in execution by the sheriff at the suit of the bankrupt, they cannot be assigned till they come to the hands of the bankrupt. R. Jon. 215. Cro. Car. 166. 176.

Nor damages, which the bankrupt may recover for trespass, or slander, before they are ascertained by judgment. Jon. 215.

(D 18.) What not. Lands, &c. sold *bonâ fide* before the bankruptcy.

But by the st. 13 El. 7. the commissioners cannot sell lands, &c. assured by the bankrupt before he became bankrupt, so as such assurance be made *bona fide*, and the party to whose use made, be not privy or consenting to the purpose of the bankrupt, to deceive his creditors, at or before such assurance.

Nor lands, which the bankrupt had sold by deed indented, though the enrolment was after the bankruptcy. Jon. 203. (d)

sails, having written to the vendee, informing him that he should remit according to the vendor's order. The vendee whilst the ship was in England, neither takes possession nor notifies the sale to the captain. The captain afterwards writes to the vendee informing him that he finds what he did not know before, that the ship and cargo have been sold to him. He writes a second time. But the vendee gives him no answer and does no act notifying his assent to the transfer. In this state of things the vendor becomes bankrupt. Held, that the ship and cargo passed to his assignees, under stat. 21 Jac. 1. c. 19. as property in his order and disposition. 4 M. & S. 240. — 45. Upon transfer of a cargo at sea, without delivery of charter-party or bill of lading, from non-existence or inability, assignee must take possession upon arrival. 2 Eden, 231. — 44. Goods at sea, assigned by a bankrupt before his bankruptcy (by an instrument of assignment, the bills of lading not having arrived, with delivery of a policy thereon and the letter from the consignor), as a security for money advanced at the time, and another sum then due, (and which former sum was advanced on the strength of such security) do not pass under the commission unless subject to the charge. 2 T. R. 485. — 45. Equitable interest on stock passes by agreement. 2 V. & B. 79. — 46. If a bankrupt, after he has obtained his certificate, and who trades again for himself, is left for several years in possession of his house, household goods and furniture, in order to assist in settling the affairs of the bankrupt's estate, the assignees repeatedly stating the goods, &c. in their accounts with the creditors, as part of the estate, such possession does not fall within 21 Jac. 1. c. 19. s. 11. so as to vest the goods in assignees under a new commission. Dougl. 317. — 47. Evidence of reputed ownership in the bankrupt, may be rebutted by evidence of a contrary reputation of ownership in the true proprietor. Holt, 327.

(d) 1. If a trader mortgage copyhold lands, but the surrender is neglected to be presented within the time limited by the custom, and the trader become bankrupt and die; the court of chancery will not permit the assignees to take advantage of the defect. 2 Vern. 565. — 2. Unindorsed securities delivered before, may be indorsed after bankruptcy. 13 Ves. 206. Esp. 40. Peake, 50. 1 Camp. 492. — 3. And the assignees receiving the amount, will hold as trustees for the party. 1 Atk. 124.

So by the st. 21 Jac. 19. no purchaser for a valuable consideration shall be impeached, unless the commission to prove him a bankrupt be sued in five years after he shall become a bankrupt.

So, if the bankrupt be afterwards outlawed, and A. gives money for a lease of his land from the king, before the commission sued, he will be a purchaser *bona fide* for so much. R. 1 Sal. 109,

(D 19.) Or which he had as trustee.

Nor lands which the bankrupt has as trustee only for payment of the debts of another. R. in Chanc. Trin. 2 Geo. inter Clopham & Gallant.

(D 20.) Or

(e) 1. Property which the bankrupt holds as trustee merely, does not pass. 3 B. & P. 40. — 2. Nor what with the owner's consent for a specific purpose. 3 T. R. 316. — 3. And the criterion of the last is to consider whether an application to any other purpose would be a breach of contract. 5 T. R. 227. 2 H. B. 501. — 4. Property in a trustee's possession, belonging to *cestui que trust*, and distinguishable, does not pass. Thus, leases and personal estate, wherewith to discharge *cestui que trust's* debts. 1 P. Wms. 314. vide Cooke. Do. — 5. So stock purchased by an agent for his principal, and so entered in his books, though taken in his own name, does not pass. 3 P. Wms. 186. — 6. On the other hand, property held by the bankrupt's trustee is assignable; thus a bond. Palm. 505. — 7. Bills or notes lodged with an agent or banker, to be specifically applied, do not pass upon his bankruptcy. 1 Atk. 252. Amb. 297. 2 Ves. 586. 2 Ves. 674. 3 P. Wms. 185. 2 Blk. 1154. 5 T. R. 215. 2 H. B. 501. 1 East, 544. 5 Ves. 169. Cooke, 384. 2 Mad. 192. — 8. To make a specific appropriation of bills, there must be either a deposit of a bill for a bill, or of several at once as one entire transaction, to answer some particular purpose. 5 T. R. 494. — 9. Endorsed bills deposited with banker, though he might negotiate them, yet remaining upon his bankruptcy, belong to the remitter. 1 Rose, 232. — 10. So do bills remitted with power to discount if not discounted. 1 Rose, 252. 19 Ves. 60. — 11. Short bills in banker's hands, unless from course of dealing treated as cash (the proof of which lies upon banker) belong upon bankruptcy to the remitter; subject, however, to the banker's lien, and his estate to be indemnified against outstanding acceptances. 17 Ves. 451. 1 Rose, 153. 245. 254. 232. 280. 2 Rose, 162. — 12. Proceeds of short bills held as agent, due before, but received after the bankruptcy, returned. 18 Ves. 229. — 13. Distinction between discount and deposit, depends, not upon fact of indorsement, but intention to transfer. 19 Ves. 229. — 14. On the bankruptcy of a customer, short bills paid by him into a banker's in the country, who, according to custom, thereupon credited him with the amount as cash, charging interest, pass under the commission, subject to the banker's lien. 9 East, 12. — 15. Bills discounted by bankers, who credit the customer for the amount, after deducting the discount, pass to their assignees, although the balance of accounts was in favour of the customer. 3 Campb. 302. — 16. A. requested permission to place in B.'s hands bills payable at six, nine, and fourteen months, &c. and to be allowed to draw out the amount by drafts at three months. B. wrote back, that he had discounted the bills, and that A. might draw out by bills at three months, the amount of the bills, discount, and commission, &c. being deducted. B. accepted bills to that amount payable at three months, but before they had fell due he became bankrupt, having in his hands the bills deposited by A. A. is entitled to the bills. 1 East, 544. — 17. Whether a bill-holder, upon the bankruptcy of the drawer and acceptor, may require the application of property lodged by the former with the latter to cover the acceptance, see 2 Rose, 182. Ibid. 1 Buck, 191. — 18. Lien of principal upon bills remitted to agent in return for other bills sent by agent to purchase coin for principal under a remittance. 5 Ves. 169. — 19. Property consigned to a partner for sale, though under a *del credere* commission, does not, if distinguishable, pass upon his bankruptcy. 2 Vern. 638. Cowp. 233. 3 P. Wms. 185. 2 Atk. 621. 5 T. R. 226. 2 H. B. 501. 3 M. & S. 575. — 20. When it is said that money has no ear-mark, the dictum must be understood as applied to an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas or other coin marked for the purpose of being distinguished, are so far ear-marked that they do not pass. 3 M. & S. 575. — 21. So the proceeds of the goods, whether bills or money,

they, if distinguishable, belong to the principal. 5 T. R. 226. 2 H. B. 501. Willes, 400. 1 Atk. 232. — 22. As likewise do goods purchased with the proceeds. 1 Salk. 160. — 23. And since, where an agent exchanges, without authority, the property of his principal, the property given in exchange will belong to his principal; if the agent becomes a bankrupt, and the newly acquired property can be distinguished from the mass of his other property, it will not pass under his commission. 3 M. & S. 562. — 24. There is an agreement between A. and B.: 1st. That A. shall, from time to time, purchase of B. all the light gold coin which he should send, at so much per guinea; and that A. shall accept bills for the money due upon such sales, payable at two months' date: 2nd. And also, that A. shall, from time to time, accept bills drawn by B. for his own convenience, and value is to be remitted, together with the light gold, to answer them. This agreement is acted under for some time, when A., being under acceptances for B. exceeding his remittances, becomes bankrupt, a commission issues against him, and B., ignorant of the facts, afterwards remits light gold and bills, for the purpose of meeting those acceptances when they should become due, which are received by the assignees. Held, that the remittances were made for a particular purpose, and that B., on discharging A.'s acceptances, might recover them back. 5 T. R. 215. 2 H. B. 501. — 25. If a factor has sold the goods of his principal, and they are not paid for at the time of the factor's bankruptcy, the principal is entitled to payment of the money. But the principal must give notice to the purchaser, before actual payment, not to pay the factor; and if he should, notwithstanding, pay the factor, he will be liable to repay it to the principal. Bull. N. P. 42. 2 Stra. 1182. 7 T. R. 359. — 26. And if after the bankruptcy payment is made to the assignees of the bankrupt, the principal is entitled to recover the amount from them. Willes, 400. Co. Bt. Laws, 579. — 27. The statutes of bankrupt do not extend to effects which the bankrupt may have in *auter droit*. 3 Burr. 1568. 1 Blk. 400. — 28. Whatever property, therefore, the bankrupt may possess as executor or trustee, whether in effects or money, which can be distinguished from his own, is not affected by the commissioners' assignment. 2 P. Wms. 518. 1 T. R. 370. 3 Burr. 1568. — 29. Nor is plate belonging to the testator's estate left in the bankrupt's possession. 1 Atk. 158. — 30. And where the assignees of a bankrupt have possessed themselves of effects which belong to the bankrupt as executor only, the court, upon an application of the testator's creditors, will appoint a receiver for receiving and securing the testator's effects. 1 Atk. 101. Co. Bt. Laws, 157. — 31. And if the assignees of the bankrupt have possessed themselves of any part of the testator's property which can be specifically ascertained, they will be compelled to account for and deliver it up. But if the bankrupt is beneficially entitled to any part of the testator's property, his interest passes to his assignees, and the lord chancellor, if necessary, will let the assignees sue in the bankrupt's name, as executor, to get in the effects. 1 Atk. 101. Co. Bt. Laws, 157. Amb. 74. 4 Ves. 40. — 32. Where a trader is made executor and residuary legatee, and before his bankruptcy collects in sufficient assets to pay the debts and legacies, and the residuum consists of debts and mortgages; Lord Hardwicke said, that in such a case, though they could not in law vest in the assignees, because the bankrupt took them in *auter droit*, as executor, the equitable interest would be theirs, and he would not scruple to let the assignees sue in the bankrupt's name, as executor, to get in the debts. Amb. 74. 1 Atk. 215. S. C. — 33. Where an executrix marries a trader who afterwards becomes a bankrupt, the commissioners cannot assign a bond debt due to her as executrix. 11 Mod. 138. — 34. Possession by the bankrupt of goods, which come to his wife as administratrix, where some of the next of kin are infants, will not vest the property in the assignees. 3 Esp. 88. — 35. Those rights only pass to the assignees, in which the bankrupt is beneficially interested; not, therefore, those which he has as trustee. Hence, the assignor of a chose in action, who afterwards becomes bankrupt, may still sue the debtor in his own name, and reply the assignment to a plea of his bankruptcy. 1 T. R. 619. — 36. The name of the person appearing as the owner in the registry of a ship, is conclusive evidence of his title; more particularly against any trust arising, not by operation of law, but by the direct act of the parties, as it would defeat the object and policy of the registry acts, if equitable interests were not excluded. 1 Rose, 177. — 37. V., a customer of the banking-house of D., and Co. transfers to N., a partner in the firm, a sum of stock by way of security for money borrowed of them, and gives notes for the amount, payable on the stock being re-transferred to him. He pays off these notes, and afterwards borrows a further sum on the joint note of himself and his son, without calling for a re-transfer. The stock so transferred having been blended with other stock, of which N. was in like manner possessed, by way of security for other customers, is sold by the partnership, and the produce applied to the use of the partnership, except a small balance still remaining in the name of N. D. (another of the partners,) afterwards dies, and the

(D 20.) Or upon which an execution was executed. (f)

Nor by the st. 21 Jac. 19. lands or goods, &c. whereof an extent or execution is served and executed before he became bankrupt.

So, if a statute be extended upon the lands, though the *liberate* was not sued before his bankruptcy. R. Cro. Car. 149. Jon. 203.

Nor goods taken in execution for the bankrupt before the return of the writ. R. Cro. Car. 166. 176. Jon. 215.

So, if an execution be made after an act of bankruptcy, and before notice of it, upon a writ tested before the bankruptcy, trover does not lie by the assignees against the officer. R. 1 Lev. 173. 1 Sid. 271.

Yet goods not taken in execution may be sold, though the writ of execution was delivered to the sheriff before his bankruptcy. R. 3 Lev. 70. 192.

(D 21.) Or which were settled upon the marriage of a son, &c.

So by the st. 1 Jac. 15. the commissioners cannot sell lands, &c. or goods, &c. purchased or conveyed by the bankrupt upon the marriage of any of his children, both parties being of years of consent.

So, if a lessee for years has a covenant for renewal, the assignee shall have no benefit of it. 2 Ver. 97.

So, if land be settled in trust for the wife of B. by the ancestor of such wife, and B. becomes a bankrupt, the assignee shall have no benefit of such trust, during the joint lives of B. and his wife. R. 2 Ver. 96.

So, if the father of B. covenant upon his marriage to pay 15*l.* per ann. to B. during the life of the father, and B. becomes a bankrupt,

partnership is carried on without any alteration of firm, till the surviving partners become bankrupt. On the bill of V. against the assignees of the bankrupts, and against the representatives of D., it was decided, that he was entitled to the stock remaining in the name of N. (the other creditors in respect of stock transferred, having been satisfied their demands) as being sufficiently appropriated; to set off against the joint notes of himself and his son, so much of the money required by the partnership, out of the sale of the remainder of the stock, as was equal to the amount of such joint note: to prove the residue as a debt against the estate of the bankrupts; and to receive from D.'s estate the amount of the deficiency. 3 Mer. 593. — 38. Certificates of the East India Company on payment into their treasury in India, and a navy bill, remitted, indorsed by the testator, to his agent in England, being at the time a creditor, if they did pass at law by the indorsement, were, after the death of both parties, the agent having become bankrupt, held not to pass in equity; the inference from the absence of evidence of a specific appropriation being against the assignees, who had obtained possession of all the letters, &c. 16 Ves. 443. — 39. The property in goods sent by wholesale dealers to a shopkeeper, on sale or return, vests in his assignees. 2 Campb. 83. — 40. The right to indorse will not devolve upon a bankrupt's assignees, if neither he nor they would have any right to demand payment. Therefore, if a bankrupt draw a bill payable to his own order, having at the time no effects in the hands of the drawee; or if, having effects, he drew it for a sum exceeding their amount, and the bill be accepted for his accommodation, his indorsement will, in the former case, confer a good title as to the whole sum mentioned in the bill; and in the latter as to such sum as is not covered by the effects. 3 East, 317. 12 East, 656. 1 Camp. 46. — 41. Bills paid to a firm of four, of whom three were bankrupts, and their notes taken as agreed, when solvent, then the fourth becomes bankrupt; assignees cannot retain. 2 Rose, 376.

(f) Vide supra.

the assignees shall not have the benefit of such agreement. R. 2 Ver. 194.

(D 22.) Debts and goods, &c. (g)

So by the st. 1 Jac. 15. the commissioners cannot assign debts paid by a debtor to the bankrupt, truly and *bona fide*, before he understood him to have been a bankrupt. R. 3 Keb. 190.

Nor goods bought of a bankrupt *bona fide* for a valuable consideration, before notice of the bankruptcy. Semb. Skin. 149.

Nor goods delivered by a bankrupt pursuant to an award confirmed in Chancery without fraud before notice that he was a bankrupt. Q. 2 Ver. 230.

Nor a bond, &c. assigned by the bankrupt for a just debt before his bankruptcy. 2 Ver. 428.

So they cannot assign money given by the bankrupt after an act of bankruptcy committed to put his son apprentice, being the usual rate, and given several years before he appeared to be a bankrupt. R. 3 Lev. 58, 9. Dub. Skin. 21.

Nor money recovered against a bankrupt before notice. 3 Keb. 231, 2.

Nor goods consigned to the bankrupt, but not paid for, which the owner before delivery, hearing that he was a bankrupt, and changing his former consignment, consigns to another. Cont. at Law, but R. in Equity. 2 Ver. 203.

So by the st. 5 Geo. 24. if mutual credit or debts appear, the commissioners, (or by the st. 5 Geo. 2. 30. the assignees,) may state the account, and the balance, and no more, shall be claimed or paid on either side. Vide post, (D 27.)

(D 23.) In what manner the sale shall be.

By the st. 13 El. 7. the commissioners or major part shall cause the bankrupt's lands, goods, &c. to be searched, viewed, and appraised to the best value; and by deed indented, and enrolled in one of her majesty's courts of record, make sale of all lands, &c. and all deeds and evidences touching only the same, and of all offices, goods, chattels, &c. or otherwise to order the same for satisfaction and payment of creditors.

By the st. 1 Jac. 15. the commissioners shall grant and assign, or otherwise dispose all debts due to the bankrupt.

And by the st. 21 Jac. 19. by deed indented, and enrolled in six months after making thereof, in some of his majesty's courts of record, they may grant, bargain, sell, and convey any entailed lands, &c.

All lands disposed by the commissioners may be sold by deed indented and enrolled.

Though the lands are entailed; and those in remainder or reversion, as well as the issue in tail, shall be barred without a common recovery.

So there may be a sale of goods by deed not enrolled. R. 2 Co. 26. a. 1 Vent. 360.

And though there be no view of the lands by the commissioners before the sale, it will be good.

So, if there be no view of the goods. R. 2 Co. 26. a.

Yet an assignment is good, though the debt assigned is more than was due. R. Ray. 7.

But an assignment of land will be void, unless it be by indenture enrolled. R. 1 Vent. 360. (*h*)

So before enrolment, a demise by the assignee is void to maintain an ejectment, though the deed be afterwards enrolled. R. 1 Vent. 360. (*i*)

But by the st. 13 El. 7. the vendee of copyhold lands before entry, or taking the profits, shall agree with the lord of the manor for his fine, and on such agreement the lord, at the next court holden for the said manor, on request, shall grant the said customary lands, &c. by copy of court roll for such estate and interest as is sold to the vendee, reserving the antient rents, customs, and services, and shall admit (*j*) the vendee his tenant of the same copyhold.

Yet the copyhold is vested in the bargainee before his admittance, though he cannot enter or take the profits. R. Cro. Car. 568.

And he shall avoid all mesne acts between the sale and admittance. R. Cro. Car. 569. Vide Copyhold, (N.)

(D 24.) Assignee of the bankrupt. — How chosen.

By the st. 5 Ann. 22. after the 25th April, 1707, the commissioners shall give notice in the Gazette, and appoint a time and place for the creditors to meet to chuse an assignee of the bankrupt's estate, and shall assign such estate to no other than such as shall be nominated by the major part of the creditors then present. So by the st. 5 Geo. 24. (*k*)

But

(*h*) Jon. 196. 12 Mod. 5. Carth. 178.

(*i*) Vide infra.

(*j*) If the vendee tenders to the lord a competent fine, which the lord refuses, and will not admit the vendee, he may enter. Str. 127.

(*k*) 1. It is not considered necessary for the assignees to be creditors of the bankrupt; and the only qualification is, that they should be of integrity, and sufficient ability, to be responsible for the sums they may receive from the bankrupt's estate. 1 Atk. 90. Ibid. 86. — 2. One creditor, if his debt be sufficiently large, may elect himself assignee of the bankrupt's estate, for the statute directs that the choice of assignees shall be made by the major part in value of the creditors. — 3. And where the assignee of a bankrupt died, and left the bankrupt his sole representative, and the debt being sufficiently large, the bankrupt chose himself assignee of his own estate; Lord Hardwicke held the choice to be valid. Green, 260. — 4. Where the act of bankruptcy consists in a fraudulent deed of assignment, a creditor who has signed the deed, may nevertheless be assignee. 4 East, 330. 2 Camp. 48. — 5. A banker receiving money under the bankruptcy is ineligible. 6 Ves. 625. — 6. As is the bankrupt, though certificated. Cooper, 286. 2 Rose, 221. — 7. There are no directions in the act when the choice of assignees is to be, but the usual practice is, for the election to take place at the second meeting under the commission. — 8. The commissioners, after declaring a party a bankrupt, are to appoint a time and place for the choice of assignees; and for the city of London and all places within the bills of mortality, the meeting of creditors for that purpose must be at the Guildhall. 5 Geo. 2. c. 30. s. 26. — 9. Commissioners may adjourn the choice of assignees from the day appointed, though creditors present concur in election. 2 Rose, 561. 1 Mad. 318. — 10. Assignees to be chosen by the majority in value of the creditors (having proved) present for 10*l*. Stat. 5 Geo. 2. c. 30. s. 26. 27. — 11. The creditors, however few, who are in a condition to vote, are the parties entitled to vote for assignees. 1 Rose, 192. — 12. Joint creditors only are entitled to vote for assignees under a joint commission. 18 Ves. 65. 1 Rose, 76. 18 Ves. 70. 19 Ves. 224. 1 Rose, 321. — 13. Separate creditors only are entitled to vote for assignees under a separate commission. 11 Ves. 603. 18 Ves. 71. 3 V. & B. 140. 1 Mer. 38. — 14. Except the petitioning creditor. 9 Ves. 349. — 15. Or where

But the commissioners in the meantime may appoint an assignee or assignees (*l*), who yet may be removed at a meeting of the creditors, if they think fit, and if removed, shall deliver up all the bankrupt's effects come to his hands unto the new assignees then chosen, and for refusal to do so in fourteen days after notice of the new assignee chosen, and his acceptance given in writing under the hand and seal of the new assignee, shall forfeit 100*l*. over and above the value of such effects, &c. So by the st. 5 Geo. 24. (*m*)

(1) 25.) What

where separate creditor is entitled, when the joint creditor may, with consent of petitioning creditor. 1 Rose, 32. 18 Ves. 285. 18 Ves. 284. 2 Rose, 337. 18 Ves. 70. — 16. Or where the joint creditors pay the separate 20*s*. in the pound. 13 Ves. 424. — 17. Where, from accident, voters are excluded from voting for assignees, and there is no fraud, the choice will not be disturbed. 1 Atk. 90. 12 Ves. 10. — 18. Secus, where there is fraud. 3 Ves. 25*e*. 6 Ves. 813, and cases there cited; 9 Ves. 35. 11 Ves. 603. 13 Ves. 421, and cases there cited. — 19. Absent creditors may, by power of attorney, authorize persons to vote for them for assignees. Stat. 5 Geo. 2. c. 50. s. 26. The execution of which power is to be proved by affidavit. Ibid. — 20. The powers of an assignee interested adversely to general creditors, will be limited. 1 V. & B. 288. — 21. Or he will be removed; or a creditor appointed to investigate his claims. 1 Rose, 324. 1 V. & B. 280. 1 Rose, 325. 3 V. & B. 139. — 22. Appointment of a *quasi* assignee in favour of a particular class of creditors, will be made where their interest is not sufficiently represented by the assignees. 2 Rose, 68. — 23. Thus, in favour of joint creditors, the commission being separate. 1 Rose, 266. — 24. An application for the appointment before the choice of assignees, is premature. 2 Rose, 337.

(*l*) 1. Provisional assignment is appropriate only where an extent [or a distress] is apprehended; [or property is perishable, or the trade must be carried on]. 1 Mad. 141. *et in notis*. — 2. It is best to leave copyholds out of provisional assignment, since thereby a double fine is avoided, and no risk of an extent is run, since extents cannot touch them. 1 Atk. 95. — 3. Where the provisional assignee died intestate, and in insolvent circumstances, and no person administered to his estate, the lord chancellor ordered the assignment of the estate and effects of the bankrupt to be vacated and made void, and that the same should be delivered up to the commissioners to be cancelled, and that the commissioners should execute a new assignment of the estate and effects of the bankrupt to the new chosen assignee. Co. Bt. Laws, 60.

(*m*) 1. Assignees will be removed in the case of misconduct. 7 Vin. Abr. 77. As for making use of the bankrupt's property. 15 Ves. 470. Permitting improper expences by the commissioners. Supra. Purchasing an estate belonging to the bankrupt at a sale by auction. And where a co-assignee permitted such purchase, he also was removed. 5 Ves. 707. — 2. So for purchasing under the commission. 5 Ves. 707. — 3. So upon proof of insolvency, compounding with creditors, or that account cannot conveniently or justly be taken whilst he remains. 12 Ves. 10. — 4. So upon becoming bankrupt. 1 Atk. 96. Ld. Loughborough's order, 9 March 1794. — 5. So from being permanently resident in Scotland. 13 Ves. 274. — 6. So upon his own petition. 3 Mad. 273; see 6 Ves. 3; Peake, 213. 1 Esp. 114. — 7. An assignee will not be removed simply because he is to account. 12 Ves. 10. — 8. Assignee will not be removed from suspicion of the fairness of his debt: it must actually have been set aside. 2 Rose, 68. — 9. Assignees will not be removed from admission as voters under separate commission of joint, in the character of separate creditors: secus, had the admission and voting been as joint creditors. 1 Rose, 315. — 10. Assignees will not be removed from improper rejection by commissioners of a debt, which would have turned the choice of assignees: if *bona fide*. 1 Buck, 201. — 11. On removing assignees, assignment, and bargain and sale will be vacated, except as to purchasers. 13 Ves. 271. — 12. The lord chancellor's order, under stat. 5 Geo. 2. c. 30. made upon petition of creditors for removing one of several assignees, does not divest the bankrupt's estate out of such removed assignee. For this the latter must release to his companions, or the commissioners must newly assign to them. 5 East, 407. 1 Smith, 487. — 13. Where an assignee becomes bankrupt, and is removed, his assignees, as well as himself, must join with the commissioners in executing an assignment to the new assignees. 1 Atk. 96. — 14. And where the commissioners and assignees were removed for misconduct, the assignees and the major part of the commissioners were ordered to join with the major part of the commissioners in the renewed commission

(D 25.) What he ought to do.

By the st. 5 Ann. 22. the assignee shall be obliged (*n*) to keep books of account of the bankrupt's estate, with liberty for any creditors to inspect them. — So by the st. 5 Geo. 24. (*o*)

(D 26.) What

in making an assignment to the new assignees. 7 Vin. Abr. 77. — 15. If an assignee (there being only one) is removed, or dies, his rights as such pass to the one newly appointed. 10 East, 61. — 16. *Quere*, whether, after the removal of one assignee, for not accounting for monies received by him, the remaining assignee may have an action for money had and received, for the amount. Peake, 69. — 17. If an assignee be removed, an action for money had and received may be maintained against him by the remaining assignee. Peake, 215. 1 Esp. 114. — 18. New assignees, upon removal or death of the former, are made parties to suit in equity by supplemental bill. 2 Comyn's Rep. 589. 2 Eq. Ca. Abr. 5. 1 Vern. 285. 426. 1 Atk. 88. — 19. Where an assignee became bankrupt after a purchase of goods under the commission, restoration of what goods remained, and proof as a debt of what had been resold, ordered. 1 Rose, 133. — 20. Upon the bankruptcy of assignees, their own estate is not entitled to proof under first commission, until bankrupt's estate is reimbursed monies retained by them. 2 Mad. 470. — 21. If assignees become bankrupts, having 100*l*. of the bankrupt's estate, their future effects will be liable to the payment. Stat. 49 Geo. 3. c. 121. s. 6. — 22. Where an assignee died before he had accounted for the bankrupt's estate received by him, and left no personal assets, it was held, that the commissioners should be considered as specialty creditors, because the assignees executed a counterpart of the assignment to them, and the agreement being under hand and seal, made it in the nature of a specialty debt, and they might come upon his real estate. 1 Atk. 88. — 23. Upon one assignee absconding, going abroad, or dying, payment to the remainder, of money in the bank standing in the names of all, will be ordered. 2 Rose, 363. 1 Mer. 408. 2 Cox, 427. — 24. Appointment of a new assignee, upon the old one absconding, will be made. 1 B. & P. 218. — 25. And if the assignees under a commission be dead, or have absconded, or from other causes cannot execute the assignment to the new assignees, the lord chancellor will, under the authority of the statute 5 Geo. 2. c. 30. s. 31. direct the first assignment and bargain and sale, except as to purchasers, to be vacated; and order an immediate assignment from the commissioners to the new assignees. 6 Ves. 451. 25 Dec. 1797. 8th Aug. 1801. Co. Bt. Laws, 276. 13 Ves. 271. — 26. Upon an assignee retiring, he must give the estate security, to be approved by the master, against any costs of suit that may be occasioned by his retiring, and permit the new assignee to use his name in actions at law. 1 Buck, 231. — 27. By a general order of Lord Loughborough, 8th March 1794, if an assignee become bankrupt, he is to be removed, and shall be no longer an assignee. And upon the death or bankruptcy of an assignee, upon application made to the major part of the commissioners, and signed by one or more creditors, having proved a debt, and entitled to vote in the choice of assignees, the commissioners are to cause notice to be given in the London Gazette of the time and place, and proceed to the choice of an assignee instead of the one dead or a bankrupt. — 28. Since the general order of 8th March 1794, no application to the court is requisite for a new election, upon the bankruptcy of an assignee. 1 Rose, 436. — 29. Order under stat. 5 Geo. 2. c. 30. s. 31, that new assignees may be chosen, and that the commissioners may execute a new bargain and sale and assignment, the former being vacated, all the assignees being dead, and the heir at law of the survivor an infant. 6 Ves. 451.

(*n*) Though the acts of parliament relating to bankrupts only direct the assignees to advertise a meeting of creditors, in relation to commencing suits, and for particular purposes; yet the assignees are very much to be commended for advertising meetings upon any other extraordinary occasion that concerns the creditors. 1 Atk. 251. 1 Bro. 267.

(*o*) 1. Assignees ordered to give up possession of lease, and execute a surrender of bankrupt's interest, lease itself being with third person as security. 1 Mad. 76. — 2. Parol agreement for a lease, though with part performance, is not within stat. 49 Geo. 3. c. 121. 2 Rose, 86. — 3. The assignees of a bankrupt tennor are not liable to the performance of covenants, unless they take possession. Peake, 238. 1 Esp. 233.

— 4. Where

— 4. Where there were two several commissions and distinct assignees, the assignees were ordered to elect or repudiate the bankrupt's agreement for a lease. 1 Rose, 57.

— 5. The court have no authority to determine the question of assignees election respecting the bankrupt's lease. 1 Buck, 190. — 6. Merely omitting to deliver the key, does not amount to taking possession. 3 Campb. 310. — 7. Assignees of lessee, chosen on the 8th, allowing his cows to remain on the premises till the 10th, and ordering them to be milked there on the 9th, become tenants to the lessor; and if the cows be removed on the 10th, to avoid a distress, he has a right to follow them, under 2 Geo. 2. c. 19. 4 Campb. 368. — 8. Where the assignees of a bankrupt, who was possessed of a term, merely put the same up to auction, to ascertain whether it was of value, without giving themselves out to be the proprietors; and there being no bidders, interfered no farther. Held, not liable as assignees of the term. 3 Smith, 330. 7 East, 335. — 9. Where the assignees of a bankrupt termor put up the lease for sale, and receive a deposit from a purchaser, they are liable as assignees of the lease, unless they show that the contract of sale has been rescinded. Holt, 290. — 10. Election of assignees to take to a bankrupt's interest in a farm indicated by acts *in pais*. 7 Taunt. 206. — 11. Assignees who enter in the middle of a year, upon premises occupied by a bankrupt as tenant from year to year, are not liable, in an action for use and occupation, for the bankrupt's previous occupation, unless it can be proved to have been permitted at their special request. 2 H. B. 519. — 12. Where a house had been let to a trader, who afterwards became bankrupt; and the landlord applied to the assignees, to know if he meant to take the bankrupt's interest in the lease; and he answered, that if he did not let it by Lady-day, he would give it up; and at Lady-day the assignee paid the rent, and offered the landlord the key. Held, that though he might have refused it at first, yet he could not take it in part, and afterwards reject it, when he found it would not answer and he could not let it. 7 East, 339. — 13. Upon the assignees repudiating the bankrupt's lease, having been in possession, issue of *quantum damnificatus* was directed. 1 Buck, 190. — 14. The repudiation, by the assignees, of the bankrupt's lease, is equivalent to a determination upon notice; hence if, in such case, bankrupt is bound to leave hay, &c. so must assignees. 1 Buck, 87. — 15. Upon the bankrupt's lease being determined by chancellor, the assignees are entitled to the off-growing crop, if that the order's being equivalent to "other sooner determination," within a covenant, will give it them. 1 Buck, 83; 2 Mad. 315. 1 Rose, 445. 1 Buck, 85. — 16. Assignees may assign the bankrupt's lease, though to an insolvent. 2 Mad. 330. — 17. Assignees, upon assigning the bankrupt's lease are not entitled to a covenant of indemnity against lessor's covenants. 2 Rose, 371. 1 Mer. 244. — 18. A landlord, when chosen assignee, cannot, for his own benefit, resume possession and re-let. 2 Rose, 244. — 19. *Supra*. — 20. Bill by bankrupt alone, for account and injunction, upheld. 2 Rose, 365. *Ibid*, 432. — 21. Bill by bankrupt alone retained, with leave to add parties, where validity of commission was doubtful. 2 Aust. 412. — 22. Upon bankruptcy of petitioner, assignees must prefer a new petition. Cooke, 519. 18 Ves. 424. — 23. Where a plaintiff became a bankrupt, and afterwards sued out execution, and the money was levied by the sheriff and brought into court, the court refused, upon motion of the assignees, to order the money to be paid to them; but they consented to detain it, so that the assignee immediately took out a *scire facias* against the defendant, to try the bankruptcy. Vent. 193. 1 Mad. 95. — 24. But where money was ordered by a decree to be paid to the plaintiff, who afterwards became a bankrupt, and he and the assignees applied by petition that the money might be paid to the assignee; lord chancellor ordered the sum (about 50*l*.) to be paid to the assignees, without a supplemental bill. 2 Bro. 322. — 25. When an action for a creditor's share, under an order for a dividend, was allowable, the assignees could set off a debt due to the bankrupt's estate by the plaintiff. Dongl. 407. — 26. A., lessee of iron-works, &c., subject to payment of rent and performance of covenants, assigns to B., as security for sums advanced, reserving to himself a mere equity of redemption. A. becomes bankrupt, and his assignees agree to convey to B. the equity of redemption in the demised premises. The assignees have no right to enforce against B. a specific performance of this agreement, by accepting an assignment, with a covenant for indemnity against the payment of the rent and performance of the covenants reserved by the original lease. 1 Mer. 244. — 27. The representatives of a surviving assignee of an estate that had paid 20*s*. in the pound, all the commissioners being dead, were ordered to execute a power of attorney to a receiver, appointed under a decree of the court, in a cause in which the surviving assignee was a defendant, to collect and get in the said estate, they being indemnified. 1 Buck, 65. — 28. The lord chancellor has not jurisdiction in bankruptcy to order an infant heir of a deceased assignee to convey, as an infant trustee, the estates of the bankrupt vested in him by the decease of his ancestor.

ancestor. But the petition was amended, and the order made under the statute 7 Ann. c. 19. 1 Rose, 310.—29. The assignees of a bankrupt partner may trade, with consent of creditors and bankrupt. 15 Ves. 228.—30. The authority of the assignees extends only to the distribution of the estate under the bankrupt law. 12 Ves. 15.—31. Assignees cannot purchase estate or dividends. 8 Ves. 337. 350. 6 Ves. 625. 10 Ves. 395.—32. And having purchased estate or dividends, are trustees of the profit upon a re-sale. 5 Ves. 707. 12 Ves. 6.—33. If more cannot be obtained upon a re-sale, the first sale shall stand. 5 Ves. 707.—34. They are trustees as to dividends for creditors or bankrupt, according to circumstances. 6 Ves. 625.—35. The assignees should sell the estate, not lease it to themselves; and, taking a lease, are answerable for profit or loss. 6 Ves. 617.—36. Assignees deferring a sale when called upon to sell, are answerable for any depreciation of price. 6 Ves. 622.—37. Sale by assignees under a bankruptcy by auction to one of the creditors, previously consulted as to the mode of the sale, and contrary to an order, that a receiver should be appointed to sell. Another sale was directed; the estate to be put up at the aggregate amount of the purchase money, and the sum laid out in substantial improvements and repairs, which were to be allowed in case of a sale at an advance, but if no farther bidding, the purchaser to be held to his purchase. 6 Ves. 617.—38. Upon assignees applying for the sale of an equitable mortgage, their costs will be paid out of the proceeds. 2 Rose, 78.—39. The costs of assignees, incurred in defending commission, are payable, and as between attorney and client, out of the estate. 2 Rose, 1.—40. Assignees are protected in payments authorized by court and commissioners. 2 B. & P. 325.—41. Assignees cannot compel a purchaser of an estate from the bankrupt, to complete the purchase, unless they make a good title to the estate. 1. P. Wms. 737.—42. Assignees, when vendors, are bound to make a good title. 12 Ves. 277.—43. And if, contracting to sell, their inability appears before contract executed, the parties will be left to law. 11 Ves. 345.—44. As they likewise will, where assignees, erroneously supposing that they had title, contract to sell. 11 Ves. 343.—45. Where assignees are vendors, and the title deeds are not deliverable, they must give attested copies; and their covenant for production should be co-extensive only with their continuance in office. 2 Rose, 215.—46. Where a bankrupt made two mortgages of several estates, and one of them was deficient in value, and the assignee of his estate filed his bill to redeem one mortgage only, the court said, that if the assignee would redeem one, he must redeem both. 2 Vern. 286.—47. Assignees of a bankrupt are not compellable to pay what is really due on a transaction attended with usury, under the general jurisdiction in bankruptcy. It is otherwise, where they apply to a court of equity, by a bill to be relieved. Belt. 392.—48. Where the assignees made a mistaken payment to assignees, under another bankruptcy, and it was divided; order for repayment out of future effects. 2 Mad. 470.—49. Assignees who had permitted the bankrupt to continue in possession of a farm for eighteen months, were ordered to sell, and to pay the costs of the application. 4 Mont. App. 31.—50. Sale and distribution ordered, under circumstances, upon the petition of one creditor. 1 Ves. 168.—51. Order for payment of dividends, upon creditor's petition, makes the assignee personally liable. 1 Rose, 456.—52. An assignee can retain a dividend in payment of his own debt due from the creditor. 1 Atk. 90. accord.; Cooke, 522. contra.—53. Award of payment, upon reference by assignees of all matters in dispute, is conclusive of assets. 2 Rose, 50.—54. Assignees made to pay the costs of an issue touching the validity of the commission; but not those of petition to supersede it. 1 Buck, 232.—55. It is the duty of the assignees to collect in the bankrupt's property with as much expedition as the nature of it will admit. But the assignees are not bound to take all the property which belonged to the bankrupt; they may make an election; but when they have elected, they cannot afterwards renounce the property. 2 Esp. 235.—56. By 5 Geo. 2. c. 30. s. 32. before the creditors proceed to the choice of assignees, the major part in value of the creditors present may, if they think fit, direct in what manner, how, and with whom, and where the monies arising by, and to be received from time to time out of the bankrupt's estate, shall be paid and remain, until the same shall be divided amongst the creditors; and the assignees are to conform to such direction as often as 100*l.* shall be got in.—57. By the 49th Geo. 3. c. 121. s. 3. after reciting s. 32. of the 5th Geo. 2. c. 30. it is directed, that in case the major part of the creditors shall not, before the choice of assignees, direct in what manner, how, and with whom, and where the monies arising from the bankrupt's estate shall be paid and remain, the commissioners, immediately after the choice of assignees, shall at the same meeting direct in what manner, how, and with whom, and where the monies arising by, and to be received from time to time out of the bankrupt's estate, shall be paid in and remain, until the same shall be divided amongst the creditors according to the 5th

Geo. 2. as often as 100*l.* shall be got in and received from the bankrupt's estate. But the commissioners are restricted from directing the monies to be paid into their own hands, or either of them, or of their solicitor; or into any banking-house, or other house of trade or business, in which the commissioners, or any of them, or the solicitor to the commission, are or is interested or concerned as a partner or partners, or otherwise. By s. 4. if assignees wilfully retain, or otherwise employ for their own benefit, any monies belonging to the bankrupt's estate, the commissioners are directed to charge such assignees, in their accounts, interest upon such monies, at the rate of twenty pounds *per centum per annum*, for the time they shall have retrained or employed the monies. By s. 6. if a commission shall issue against an assignee, who, at the time of the issuing of the commission against him, shall be indebted to the estate of the bankrupt of whose estate he was an assignee, in 100*l.* and upwards, in respect of money come to his hands, and wilfully retained or employed by him for his own benefit, the certificate of conformity obtained by such assignee so becoming bankrupt shall only free the person of such bankrupt from arrest and imprisonment; but his future estate and effects shall remain liable for so much of his debt to the estate of the bankrupt, of whose estate he was assignee, as shall not be paid by dividends under the said commission, together with lawful interest for the whole debt, in like manner as if he had not obtained his certificate; the tools of trade, the necessary household goods and furniture, and necessary wearing apparel of such bankrupt, and his wife and children, only excepted. — 58. Assignees may be sued for travelling expences of a witness, after allowance by the commissioners. 1 Esp. 64. — 59. Assignees may make themselves liable to their solicitor, beyond what a master in chancery will allow in taxation. 2 Campb. 278. — 60. Cases prior to stat. 49 Geo. 3. c. 121. s. 4, upon the subject of charging assignees with interest for money retained in their hands, are, 1 Atk. 89. 1 Bro. 384. 1 Ves. 89. 236. 15 Ves. 470. 1 Cox, 50. 1 Cox, 439. — 61. The stat. 49 Geo. 5. c. 121. s. 4. is imperative to charge assignees 20*l.* per cent. for money retained in their hands. 1 Rose, 144. — 62. They are chargeable with interest for keeping money too long in a bank, paid in by direction of creditors, 18 Ves. 246. — 63. But not for misapplication by agent of money given to purchase exchequer bills. 1 Buck. 197. — 64. Chancellor cannot indemnify assignees against the consequences of a supersedeas. 2 Rose, 17. — 65. Trespass lies by one declared bankrupt against his assignees for taking possession, if he was not liable to the bankrupt laws. 2 Wils. 382. — 66. Commission of bankruptcy superseded for fraud; nothing done under it; and the petitioning creditor not to be found. The assignees, not having attended the summonses, though not privy to the fraud, and not having received any effects, ordered to reimburse the messenger the expence subsequent to the choice of assignees, not that previously incurred. 9 Ves. 109. — 67. If an assignee employ a person in the conduct and management of the bankrupt's property, who misapplies and embezzles the money; the assignee will be liable to make it good to the creditors, unless he consult the body of the creditors, who are his *cestui que trusts*, in the appointment of such person. 1 Atk. 86. — 68. But when the assignees employ a person either from necessity, or conformable to the common usage of mankind, they are not answerable for losses. As where an assignee employed a broker to sell a quantity of tobacco, the broker received the money, and in ten days failed, without having paid it over; the assignee was held not bound to make it good. Anib. 218. 1 Kenyon's Rep. 38. — 69. An assignee of a bankrupt employs a broker to sell and receive the money for goods, who, after the sale, dies in insolvent circumstances; held, that the assignee is not responsible to the creditor for the value of the goods sold by the broker, beyond the dividend actually received from the broker's effects. 1 Kenyon's Rep. 38. — 70. Assignees are each separately answerable only for what they receive, and the misconduct of one assignee will not operate against his innocent co-assignee. 1 Atk. 88. Ibid. 87. — 71. Bill of foreclosure against assignees filed before bargain and sale, will not therefore be dismissed. 1 Buck, 135. — 72. Contribution *inter se* decreed to a payment by one under an order, for a loss occasioned by their joint act; though represented that they joined for conformity only and at the instigation of that one. 1 V. & B. 114.

(D 26.) What interest he shall have.

By the st. 1 Jac. 15. the assignment of debts of the bankrupt by the commissioners shall vest a property (*p*) in the assignee.

So by the st. 5 Ann. 22. all the effects and estate of the bankrupt, delivered to a new (*q*) assignee chosen by the creditors, shall be actually vested in him, as if the first assignment had been to him. So by the st. 5 Geo. 24.

And by the assignment (*r*) of the commissioners, the property shall be vested in the assignee by relation from (*s*) the first act of bankruptcy, as to the avoidance of all (*t*) mesne acts. R. 1 Sal. 111.

And

(*p*) 1. The rights and equities of assignees are co-extensive only with the bankrupt's. 1 Ves. 331. 2 Atk. 569. 2 Show. 103. 2 Vern. 286. 2 Ves. jun. 255. 9 Ves. 100. 12 Ves. 349. 13 Ves. 188. 2 V. & B. 509. — 2. Though having all the equity which creditors have, they may impeach transactions which the bankrupt could not. 2 Ves. jun. 285. — 3. They take the bankrupt's rights, subject to the conditions imposed upon them. Hence, where a bankrupt, before his bankruptcy, agreed that his surety might retain any debt he should contract, so long as the principal debt remained unsatisfied; held, that the assignees could not sue him for the price of goods sold after the agreement and before the bankruptcy, the principal debt not having been paid. 5 T. R. 133. — 4. Where a bankrupt, from the circumstances of a case, would be considered as a trustee for another, his assignees will be considered as trustees also. 2 Atk. 558.

(*q*) By stat. 5 Geo. 2. c. 50. s. 31. after reciting, that it might be found necessary that assignments of bankrupt's estates should be vacated, and new assignments be made of the debts and effects unreceived, and not disposed by the then assignees to other persons to be chosen by the creditors; the holder of the great seal is empowered, upon petition, to make such order therein as he shall think just and reasonable. And if a new assignment should be ordered to be made, then that the debts, effects and estate of the bankrupt should be thereby effectually and legally vested in such new assignees: and they are empowered to sue for the same in their own names, and to give discharges, &c. the same as the old assignees. And the commissioners are to give notice in the two London gazettes that shall immediately follow, of the removal and new appointment, &c.

(*r*) The title of assignees is complete without notice. 2 Rose, 291.

(*s*) 1. The bankrupt's freehold property remains in him till the execution of bargain and sale by the commissioners to the assignees; under which there is no relation back of the title of the assignees, to the time of the bankruptcy. Hence, in ejectment for the recovery of such property, if the time of the demise be between the act of bankruptcy and the execution of the bargain and sale, the demise must be laid in name of the bankrupt. 2 M. & S. 446. — 2 Vide *supra* as to *Relation*.

(*t*) 1. The crown is not bound by the acts relating to bankrupts, not being named in them. And until an actual assignment by the commissioners, an extent served upon the property of the bankrupt will bind from the *teste* of the writ. Sir Wm. Jones. 7 Vin. 104. 2 Ves. 282. 2 Str. 749. — 2. If an extent be issued from the crown, tested the day of the date of the assignment, the crown will be preferred. Park. Rep. 126. 2 Ves. 295. — 3. Possession under extents, of which the first, for part of the debt, was tested the day upon which the provisional bargain and sale was executed; crown preferred. 4 Ves. 752. — 4. If the writ be tested after the execution of the assignment, the crown is barred. 7 Vin. 104. 2 Ves. 289. 2 Stra. 749. — 5. Creditors preferred to extent for acceptances not due at bankruptcy. 17 Ves. 431. — 6. Where a person was bound in a recognizance, which became forfeited, and an extent was sued, and the goods extended, and the writ and inquisition returned by the sheriff; held, that the inquisition having been returned, although the debtor became a bankrupt before the issuing of the liberate, the creditor had a lien upon the goods against the assignees. Cro. Car. 148. S. C. Jones, 205. — 7. Land-tax money in the hands of the collector, is a debt due to the king. Where, therefore, the commissioners of the land-tax issued their warrant, which was executed before

And a release of a debt by a trustee for a bankrupt, made after the assignment, is of no avail. R. Pal. 505.

(D 27.) What power to discharge debtors, &c.

By the st. 4 & 5 Ann. 17. on proof before the commissioners, that mutual credit hath been between the bankrupt and his debtor, and that the accounts be open and unbalanced, they or the assignees may adjust the accounts, and the debtor shall not be obliged to pay more than the balance.

So by the st. 5 Ann. 22. the assignees or major part (*u*) may make composition with a debtor of the bankrupt, where it shall appear reasonable, and take such part of the debt as can be gotten on such composition, in discharge of the whole. So by the st. 5 Geo. 24. (*x*)

So by the st. 3 Geo. 12. the clause that a debtor shall pay no more than the balance was enlarged for seven years.

So by the st. 5 Geo. 24. where there is mutual credit, the commissioners may state the account, and the balance only shall be paid or claimed on either side. (Vide 5 Geo. 2. 30.) (*y*)

So

before the assignment, it was held good; and that they might take away the goods after the assignment. But the warrant of the commissioners of land-tax will not, like an extent, bind the goods from the date. 2 Stra. 977. — 8. Since a bankrupt's property in goods assigned to his provisional assignee is divested, a seizure of those goods for a penalty incurred by the bankrupt in respect of them, under an excise warrant to seize the bankrupt's goods, is illegal. 6 T. R. 437.

(*u*) 1. With respect to the joinder of assignees in the assignment of an equitable mortgage created by bankrupt; though power of sale upon notice to repay is annexed, yet, if no notice, they must join. 1 Price, 138. — 2. One of several assignees may, unless his companions express their dissent, alone give a good discharge for a debt owing to the estate. 1 Esp. 114. Ibid. 172. *Semble contra*, 3 Atk. 695 — 3. A general authority from one of several assignees to the other assignees to act for him, is not sufficient to enable them to execute a release by deed. There must be a special authority for that purpose. 4 Esp. Rep. 220. — 4. A release, executed by one assignee in the presence of a co-assignee, binds both. 4 Esp. 220.

(*x*) 1. Assignees may, with consent of majority in value of creditors, at a meeting convened for the purpose, submit differences and make composition. 5 Geo. 2. c. 30. s. 34, 35. — 2. A general power given to the assignees to compound debts, is not sufficient; the creditors must be convened to consider each particular case. 3 T. R. 23.

(*y*) 1. The statutes of set off extend to assignees under a commission of bankruptcy. Cowp. 133. 2 Atk. 48. 1 Wils. 155. — 2. The doctrine respecting set off and mutual credit, is the same in equity as at law. Swanst. 31. — 3. The lord chancellor sitting in bankruptcy exercises an equitable as well as a legal jurisdiction, and will extend that jurisdiction to cases of set off that are not within the immediate operation of the statutes. 1 P. Wms. 325. 1 Atk. 100. 3 Ves. 248. 5 Ves. 108. 11 Ves. 24. 517. 12 Ves. 346. — 4. The stat. of 5 Geo. 2. c. 50. s. 28. relates not only to mutual debts, but to mutual credits; and the judges have uniformly observed, that this clause has received a very liberal construction, and there have been many cases which it has been extended to, where an action would not lie, and where the court of chancery could not upon a bill decree an account. See 1 Atk. 228. 1 P. Wms. 325. Co. Bt. Laws, 554. 7 T. R. 378. — 5. Wherever there is a mutual trust, that is, wherever the bankrupt, when solvent, trusts his creditor with goods (here with the power to sell) it is a case of mutual credit. 5 Taunt. 56. — 6. The statute is not confined to dealings in trade only, or mutual running accounts; but in all cases of mutual credit, only the balance shall be paid. And therefore where A. borrowed 1,500*l*. of B. upon mortgage, and B. owed about 1,400*l*. to A. upon notes, A. was allowed to set off his demand upon the notes against the mortgage. 1 P. Wms. 325. — 7. A trust between two parties is a mutual credit. Co. Bt. Laws, 557. 7 T. R. 380. — 8. Mutual credit may be constituted, though the parties do not mean particularly to trust each other. As where the holder of a bill of exchange obtains possession of it

it after acceptance in the common course of negotiation, and the acceptor is ignorant of its being in the holder's hands, and sells him goods: this is a mutual credit, for credit is given to the acceptor by every person who takes the bill, which constitutes the credit on the part of the holder; and on the part of the acceptor, credit is given to the holder by the sale of goods to him, and the holder may set off the bill in an action by the assignees of the acceptor for the amount of the goods. 3 T. R. 507. — 9. In the construction of the statute 5 Geo. 2. it has been held as a general rule, that no debt or credit can be set against each other by way of set off, unless each debt or credit accrued or was given before the bankruptcy; therefore, if a man be a debtor to a bankrupt before his bankruptcy, and a creditor to him upon a contingency that does not take place until after the bankruptcy, he shall not be at liberty to set off under the clause relating to mutual credit. 1 Atk. 119. — 10. So, in an action brought by the assignees of a bankrupt for money due to the bankrupt, the defendant may plead a set off of money due from the bankrupt. But, if some of the counts are for debts arising since the bankruptcy, he cannot so plead as to these. Cowp. 133. — 11. So where the contingency, which is to determine the nature or amount of the debt to the bankrupt, does not happen until after the bankruptcy, the debtor cannot set off against it a previous debt due from the bankrupt. 4 Taunt. 775. — 12. But although the demand depend upon a contingency, if it be secured by a penalty which is forfeited at law, it might be set off. 3 T. R. 435. — 13. And where a demand arises upon a bond payable unconditionally on a day certain, but not until after the bankruptcy; it may be set off against a debt due to the bankrupt at the time of the bankruptcy. 1 Atk. 231. — 14. And now by stat. 46 Geo. 3. c. 135. s. 3. mutual debts and credits may be set off, notwithstanding a secret act of bankruptcy. — 15. Acceptances due after drawer's bankruptcy may be set off. 15 Ves. 65. — 16. The acceptor of a bill, drawn by the bankrupt before, but paid to an indorsee since the bankruptcy, may set off the payment to an action by the assignees, as mutual creditors, under stat. 5 Geo. 2. c. 30. s. 28. 4 T. R. 211. — 17. And where a person lent notes of hand, and received from the borrower a memorandum, promising to indemnify him against them, and the borrower became a bankrupt; he was held entitled to set off the amount of a debt due from him to the bankrupt, against the notes paid by him after the bankruptcy. Co. Bt. Laws, 561. — 18. If a bill of exchange be indorsed to the debtor of a bankrupt after the bankruptcy, it cannot be set off against a demand by the assignees. 2 Stra. 1254. — 19. And in an action brought by assignees of a bankrupt upon a promissory note payable to the bankrupt, the defendant cannot set off cash notes issued by the bankrupt payable to bearer, bearing date before his bankruptcy; unless the defendant shows that such notes came to his hands before the bankruptcy. 6 T. R. 57. — 20. Defendants accept bills for the accommodation of a trader, who, after a secret act of bankruptcy, lodges money with them to meet their acceptances. They cannot, under 5 Geo. 2. c. 30. s. 28. set off the amount against their acceptances. 2 Campb. 313. — 21. A loss, upon a policy, after bankruptcy of assured, cannot be set off. 2 Rose, 249. — 22. Costs taxed after, though ordered to be paid before bankruptcy, cannot be set off. 15 Ves. 539. vide supra. — 23. A demand against a bankrupt cannot be set off in an action by his assignees, for trover and conversion, subsequent to the bankruptcy, of effects belonging to the bankrupt's estate. Dougl. 101. — 24. If a banker receives and pays money on account of a bankrupt, after notice of his bankruptcy, he cannot set off the payments against the receipts. 2 T. R. 113. 3 Bro. 313. — 25. Where A. became bound as a surety for a trader, who in order to indemnify him, agreed that he should retain, out of any money that should be due from him to the trader, in respect of any dealings between them in trade, so much as he should pay on the bond; and the trader afterwards sold goods to A. and then became a bankrupt, and A. was obliged to satisfy the bond. A. was held entitled to set off what he paid upon the bond after the bankruptcy, against the goods sold before the bankruptcy. 5 T. R. 133. — 26. Where three persons joined in an adventure to purchase and sell some pearls, and one only was to advance the money and to sell them, but the profit and loss were to be divided between them in thirds. One of the parties became a bankrupt, and the party who was to sell the pearls was allowed to set off a debt due to him from the bankrupt, for goods sold before the bankruptcy in an action commenced against him by the assignees, against the third of the adventure due to the bankrupt, although the pearls were not sold nor the produce received till after the bankruptcy. Co. Bt. Laws, 557. — 29. Set off of post-obit debt payable to bankrupt, refused. 1 Rose, 301. — 30. The indorsee of a dishonoured bill may, on the bankruptcy of the indorser, consider it as an item to be set off in taking the account between them; and therefore is not bound to apply in discharge thereof money in his hands belonging to the acceptor. 1 M. & S. 545. — 31. Credit is given to the acceptor of a bill of exchange by every person who takes the bill. Therefore, the

the indorsee of a bill may, on the bankruptcy of the acceptor, set off the bill against a debt owing to the bankrupt. 3 T. R. 508. n. (a). 6 T. R. 57. 4 Taunt. 888. — 32. Bankers discount bills for A., and state an account in which they give him credit for the net proceeds; whilst the bills are running, A. becomes bankrupt. This is a case of mutual credit, and the bankers are not bound to come in under the commission, upon the bills which are dishonoured. Holt, 408. — 33. The bankrupt's acceptances cannot be set off as mutual credit, unless there was some connection between him and the creditor, when they were originally given. 4 Taunt. 888. — 34. The vendee of goods before the bankruptcy cannot, to an action by the assignees for the price, set off a bill of the bankrupt, received by the vendee, before the purchase, from a third person, under the idea that the vendor was failing, and with the view of covering it by the purchase. 16 East, 150. — 35. Proceeds of one bill applied in satisfaction of another, upon circumstances of specific appropriation. 2 Rose, 366. — 36. A. was indebted to B. in two different sums; when the first became due, B. received from A. a bill exceeding the sum due, under promise to return the excess when paid; A. becomes bankrupt. B. was allowed to set off the excess against the other demand. 7 T. R. 578. — 37. Set off for prior advances against assignees demanding dishonoured bill, pledged for subsequent advances, under agreement to return surplus, refused. Swanst. 30. — 38. Where an insured, being indebted to the underwriter on a balance of accounts becomes bankrupt, if a loss afterwards happen, the underwriter, in an action by the assignees, may deduct the balance due to him, from the amount of his subscription. 2 Mars. 561. — 39. An underwriter is entitled, where the assured has become bankrupt after the policy of insurance was effected, to deduct what was due to him before the bankruptcy, on a balance of accounts between the assured and himself, from out of the amount of his subscription to the policy, in the event of a loss subsequent to the bankruptcy, under 5 Geo. 2. c. 30.; the stat. 19 Geo. 2. c. 32. s. 2. suspending the effect of a bankruptcy in the case of an assured, and the underwriter, on both sides, so as to let in the former statute, till the result of the voyage shall have been ascertained, and the accounts stated; because the 19 Geo. 2. c. 32. (admitting persons assured to claim losses against bankrupt underwriters, although happening after the bankruptcy), is *in pari materia*, and the two states are to be construed with reference to each other, so as to make them mutually beneficial; and therefore it was held, that a set off must be allowed to a solvent underwriter, by the assignees of a bankrupt assured, under 5 Geo. 2. c. 30. 3 Price, 227. — 40. A broker with a commission *del credere* (upon which circumstance the case turned, see 1 T. R. 113.) effects policies in his own name, on account of his principal, who is unknown (though the circumstance is immaterial) to the underwriter; losses happen; the underwriter becomes bankrupt; after which the amount of the losses is paid by the broker to his principal. Held, 1. That the underwriter must be considered as having dealt with the broker as a principal, and having given credit to him; so that the case was one of mutual credit, within the stat. 5 Geo. 2. c. 30. s. 28, and therefore that the broker might set off the losses in an action brought against him by the assignees. 2. That this might be done under the general issue non assumpsit, since, by the above statute, the assignees, in a case of mutual credit, are only entitled to the sum due after deducting such credit. 1 T. R. 112. — 41. A broker under a commission *del credere*, effecting policies in his own name, for principals unknown to the underwriter, must be considered, *quoad* the underwriter, as a principal, and as one to whom he has given credit. So that if losses happen before, though they are not adjusted and paid by the broker to the principals till after the bankruptcy of the underwriter, the broker may set them off against an action brought by the assignees. 1 T. R. 285. — 42. An insurance broker effects policies as such, in the following manner: one in his own name, and on his own account; one in name and on account of his principal. He is acting under a *del credere* commission. Losses happen on all three. All of the underwriters, but one, adjust and sign off the losses. That one does not, having become insolvent. The broker gives his principal credit, but does not pay him for this underwriter's subscription, conformably to the adjustment made by the other underwriters. This underwriter becomes bankrupt. The broker is indebted to him for premiums of insurance. His assignees sue for them, and the question arises, whether, under the stat. 5 Geo. 2. c. 30. s. 28. the broker is entitled to set off the losses. That statute gives the right of set-off where there has been "mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person." Held, that in respect to the policy made, as well in the name as on account of the broker, though on account of the principal, there was credit given by him to the underwriter, since the underwriter consented to consider him, and dealt with him as principal; and therefore, *quoad* these, he had a right of set-off; but not *quoad* the other. 2 M. & S. 112. — 43. Where a principal entrusted his broker with a policy of insurance to receive

ceive an average loss under it, and became a bankrupt, and the broker afterwards received the average loss, he was allowed to set off several sums of money due to him from the bankrupt for premiums, &c. against the amount he received upon the policy after the bankruptcy. Co. Bt. Laws, 566. Ibid. 567. — 44. But if a broker has not a *del credere* commission, he will not be permitted to set off losses on goods which he insured for other persons; for in that case the debts are due only to the insured, and not to the broker. Cited 1 T. R. 113. 1 Esp. 274. — 45. An insurance broker, without a commission *del credere*, is not entitled to set off, against an action for premiums by the bankrupt underwriter's assignees, the counter claims of the assured, which arose, but were not adjusted before the bankruptcy. 16 East, 382. — 46. In an action by the assignees of a bankrupt underwriter against a broker, for premiums due to the bankrupt, *semble*, that the broker cannot set off a loss on a policy effected by him as agent, without a commission *del credere*, where there has been no adjustment; though the loss took place before the bankruptcy. 2 Mars. 215. 6 Taunt. 519. — 47. An insurance broker, not entrusted with the custody of a policy, effected, not in his own, but in his principal's name, is not entitled, in case of the underwriter's bankruptcy, to set off a loss against premiums due from himself to the bankrupt, though he has a commission *del credere*, and though that commission was expressed in the body of the policy. 7 Taunt. 478. 1 Moore, 178. — 48. An insurance broker cannot set off returns of premium due from a bankrupt underwriter, against premiums due from himself to the underwriter. 4 Taunt. 554. — 49. Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. 7 T. R. 360, in note. 7 T. R. 359. Ibid. and Co. Bt. Laws, 378. — 50. An executor cannot set off a debt due from himself on his own account to a bankrupt, against a debt due from the bankrupt to the testator, even though the executor be residuary legatee. 3 Atk. 691. — 51. A testator in his life-time appointed an attorney to collect his rents; after his death the attorney received rent which was in arrear in the testator's life-time; the executrix of the testator brought an action for the money in her own name, and the attorney was not allowed to set off a debt due by the testator to him. 1 Esp. N. P. 240; Bull. N. P. 180. — 52. A man became indebted to his uncle for board, &c.; the uncle by his will left him a legacy, and appointed his son executor; the nephew afterwards became indebted to the executor, and then sued him in the spiritual court for the legacy. The executor filed his bill in chancery against the nephew, and he becoming a bankrupt, against his assignees, for an allowance to be made him out of the legacy, for the money which the bankrupt (the legatee) owed to the testator, and likewise to the plaintiff. The court decided, that a legacy due from an executor who admits assets, is in equity a debt due from the executor, and allowed the set-off. 2 P. Wms. 128. — 53. Directors or trustees of a company incorporated by charter, or act of parliament, cannot set off a debt due to them in their individual characters, against a demand made upon them by the assignees of a bankrupt, for stock due to the bankrupt from the company in their corporate capacity. 1 E. C. Ab. 9. — 54. But where there was an express by-law, subjecting the stock of each member to any debts he should owe the company, and the banker of the company was indebted to them for a balance in his hands, and became a bankrupt; the company was allowed to set off the stock which the bankrupt held in the company, against the balance to them on the banking account. 1 E. C. Ab. 9. 1 Stra. 645. — 55. Set-off of bankrupt partner's share of joint credit against his separate debt, and proof for residue. 5 Ves. 248. — 56. Set-off of separate debt from, against joint debt to, the estate, and proof for residue. 12 Ves. 346. — 57. Set-off of bankrupt's debt to one partner, against joint debt of him and partner, upon bond to secure his debt. 18 Ves. 232. — 58. Set-off and joint proof allowed, under the circumstances. 1 Mad. 577. — 59. A person drew and gave a note to his bankers, on account of a debt due to them; they indorsed the note to another firm formed of some of the partners in the banking house; the holders of the note brought an action against the drawer; the drawer was allowed to set off a debt due to him from his bankers. Peake, 197. — 60. A., B., and others carried on a partnership together, but B.'s was the only name that appeared. In an action by the partners, the defendant was allowed to set off a debt due to him from B. 2 Esp. Rep. 269. — 61. The petitioner was a creditor under a separate commission against A., and debtor to a joint commission against A. and B.; he prayed that an action, brought by the assignees for the debt he owed to the joint commission might be staid, and that his demand upon the separate estate might be allowed

So before these statutes, where there was mutual dealings, the balance only should be paid. Per Hale, 2 Ver. 117. Q. 2 Ver. 254. per North, 1 Mod. 215.

So, if the bankrupt before his bankruptcy had assigned a bond, and was indebted to the obligor, the obligor shall be allowed to deduct the debt to him against the assignee of the bond. Semb. 2 Ver. 428.

(D 28.) How the assignment shall be made.

The assignment may be made (z) to the creditors who come in of all the goods of the bankrupt, for satisfaction of their respective debts rateably.

Or to any in trust, and for the equal benefit of all the creditors.

And if all the creditors have a joint debt, the goods may be assigned to them generally. R. 2 Co. 26. b.

But a general assignment of the goods to the creditors, who have several and different debts, is not good. R. 2 Co. 26. b. (a)

(D 29.) What

allowed as a set-off against the debt he owed the joint estate. Lord Chancellor doubted whether the debt could be set off under the statute relating to mutual debts. 1 Atk. 100. — 62. *Semble*, that a creditor, sued by the solvent partner and bankrupt's assignees, for money received on a bill transferred to him by a bankrupt partner, cannot set off a demand due from the partnership. 10 East, 418. — 63. A creditor of a partnership having made farther advances on the security of a bill of exchange, deposited with him for that purpose by the partners, and having undertaken to receive the amount when due and return the surplus, the bill having been dishonoured and remaining in his hands unpaid, is not entitled, on the bankruptcy of the partners, to set off his prior advances against a demand by the assignees for the bill. Swanst. 50. — 64. Three partners, A., B., and C., deliver bills to D. for a special purpose; A. and B. become bankrupts. In an action by their assignees against D. for the proceeds of the bills, held, that C. not having been made bankrupt, this was not a case of mutual credit within 5 Geo. 2. c. 30. s. 18. so as to entitle the defendant to set off the bills against a debt due to him from A., B., and C. 1 Mars. 184. — 65. Set-off by part-owners of ship of separate debts due from, against joint debts due to, bankrupt, refused. 10 Ves. 105. — 66. Debt due to wife *dum sola*, cannot be set off against debt due from husband. 2 Rose, 249. — 67. Where there is mutual credit between a bankrupt and creditor, the commissioners ought to stop interest on both sides, at the time of the bankruptcy, or compute interest on both sides till the settling the account. 1 Atk. 80. — 68. If a broker, having a *del credere* commission, pay by mistake the whole money due to the assignees, without deducting the amount which he is so allowed to set off, he may recover it back from the assignees as money had and received to his use. 1 T. R. 285.

(z) 1. Commissioners have no estate, but only a power, which must be executed by the means prescribed by the statute, with the circumstances therein directed, namely, by the majority; and not merely by deed indented, but also enrolled. Stat. 13 Eliz. c. 7. s. 2. 11, 12. 1 Jac. 1. c. 15. s. 13, 14. 21 Jac. 1. c. 19. s. 11, 12. 14. 15 Geo. 2. c. 30. s. 31. 42. If it deviate, it is a nullity. Jones, 196. 1 Vent. 360. 12 Mod. 3. Carth. 178. — 2. No schedule to be annexed to the commissioners' assignment. Stat. 5 Geo. 2. c. 30. s. 42. — 3. In the assignment the assignees enter into covenants to perform their trust, and the words jointly and severally should be inserted, for the safety and security of each respective assignee. 1 Atk. 88.

(a) 1. For future real estates, come to the bankrupt between the issuing of the commission and the confirmation of his certificate, there must be a new conveyance. 1 Atk. 253. 1 P. Wms. 388. Billing, 118. — 2. As where they descend upon him. 3 Mar. 667. — 3. To an action on a promissory note, given to an uncertificated bankrupt after the commission issued, the defendant pleaded the bankruptcy of the plaintiff and commissioners' assignment, and that the assignees demanded payment of him: the plaintiff replied, that there had been no assignment to the assignees after the making of the note, and that the defendant treated with the plaintiff as one capable of contracting personally. Held, that the demand by the assignees vested the right

(D 29.) What remedy the assignee shall have. (b)

The assignee shall have the same (c) remedy for recovery of debts due to the bankrupt, as the bankrupt himself could have.

And therefore he may have debt upon a bond or contract made to the bankrupt. Cro. Car. 187. 209. R. 2 Cro. 105.

Or action upon the case upon assumpsit. Lut. 274.

And the proper method, is to allege a promise to the bankrupt himself, and not to the assignee, except where an express promise is made to him after the assignment. Per Holt, Mod. Ca. 131. R. 2 Sho. 238.

Or, if money of the bankrupt is received by B. after the assignment, this is a new contract, and amounts to an express promise to the assignee. Mod. Ca. 131. (d)

So, if the bankrupt had a judgment, the assignee may have a *scire facias* upon it. 1 Vent. 193.

And, if after the assignment, and before the *scire facias* by the assignee, the bankrupt himself sues execution, and the money is levied, the court will stay it in the hands of the sheriff, or in court, till the assignee sues a *scire facias*. 1 Vent. 193.

And in a *scire facias* by a bankrupt against the terretenant and judgment for him, if the plaintiff dies, the judgment may be entered at the request of the assignee, without a new *scire facias*. 5 Mod. 88.

So, if the goods, &c. of the bankrupt come to the hands of another, the assignee shall have trover; for the property is vested in him. 2 Vent. 63.

Though they come to his hands by force of an execution at his suit, executed after the bankruptcy. Semb. Sho. 12. 1 Sal. 111.

in them; that a new assignment of personal property was not necessary, and that the mode of contracting was immaterial. 3 Smith, 58. 7 East, 53.—4. When commissioners have executed an assignment of the bankrupt's estate, and afterwards given him his certificate, they cannot make a subsequent assignment. 1 P. Wms. 386.—5. Where the original deed conveying the bankrupt's estate was lost, the chancellor refused to make an order that the counterpart should be enrolled as the original deed, although an affidavit was made of the loss. Anib. 180. 2 Com. Dig. 25.

(b) Vide infra.

(c) 1. Assignees not to commence suits in equity without the consent of the creditors. Stat. 5 Geo. 2. c. 30. s. 38.—2. Creditors cannot give a general power to assignees, to prosecute suits (or submit matters to arbitration) at their own discretion; there must be a meeting of creditors upon a notice given in the London Gazette, to consider each particular case. 1 Atk. 90.—3. Assignees, however, may sue without consent of creditors, where creditors interests are not affected. 2 Rose, 371. 1 Mer. 244.—4. And may sue at law without consulting the creditors. 3 Salk. 59. 12 Mod. 324. Cowp. 570. 5 Ves. 583.

(d) A. commits an act of bankruptcy, and quits England, having previous to his act of bankruptcy become indebted as indorser of a bill of exchange to B., which bill is dishonoured, and due notice thereof given. In A.'s absence, his wife makes insurances, the broker being still a creditor for the premiums paid by him. B. having sued the drawer, and obtained judgment, is induced by A.'s wife to take a bill in part payment, indorsed by her for A., and stay execution upon depositing the policies; which being done, a loss happens. This bill not being paid, B. the broker accepts another for the amount, in his favour, upon the policies being delivered to him for A., with the consent of A.'s wife; and having received the money thereon, pays that bill, and deducts in account with A.'s assignees, against whom a commission is issued after such payment. Held, that the assignees could not recover of B., for A.'s wife and the broker were their agents, and they could not take the benefit of the policies effected by her without taking the burthen. 3 Smith, 164. 7 East, 164.

And he may declare generally, *quod cum possessionatus fuisset ut de bonis suis propriis*. Dub. 1 Sal. 111.

If A. and B. are joint obligees or partners, &c. and A. becomes bankrupt, and the assignment be to B., he shall maintain an action upon the bond alone, being entitled to a moiety in his own right, and to the other moiety as assignee. Semb. per Wind. but the others Dub. Ray. 7. 1 Lev. 17.

So, if a debt of A. be assigned, part to one creditor, part to another, each may sue for his part; for the statute makes a severance, Per Warb. Godb. 195, 6. Adm. cont. 1 Lev. 17.

And, if the bankrupt afterwards sues for the debt, the defendant may plead that he was a bankrupt, and that the debt was assigned. Lut. 701.

But after the commission, and before the assignment (*e*), the bankrupt may sue for his debt in his own name. Per Holt, 1 W. & M. R. 1 Sal. 108.

So, if the sheriff, &c. execute an execution by *feri facias* tested before the bankruptcy, trespass does not lie against the officer, though the execution was executed after the commission awarded against the bankrupt. R. 1 Sid. 271. 1 Lev. 173. R. Sho. 12. 3 Mod. 236.

So after assignment, the bankrupt may (*f*) maintain trespass; for damages are uncertain, and not assignable. 2 Keb. 372. (8)

So covenant, (*g*) 2 Keb. 372. Per 2 J. 1 Ca. Ch. 71. (*h*)

So

(*e*) The bankrupt represents his estate previous to the choice of assignees. 19 Ves. 217.

(*f*) An attorney, though bankrupt, may practise. 2 Ves. J. 68.

(*g*) Sed vide supra.

(*h*) 1. The bankrupt can acquire property only for the benefit of his assignees, 10 Ves. 94. See 16 Ves. 474. — 2. And if an uncertificated bankrupt assign after acquired property in trust, for a valuable consideration, and a creditor of the bankrupt's seize it in execution; the trustee may maintain trover against him. Peake, 140. — 3. There are determinations that the assignees are not entitled to the earnings of an uncertificated bankrupt by his personal labour. Co. Bt. Laws, 431. Esp. N. P. 140. — 4. A bankrupt may recover in ejectment, premises which the assignees have given up to him, as not worth an assignment. 5 Taunt. 440. — 5. An uncertificated bankrupt has a right to money on goods acquired by him since his bankruptcy, against all but his assignees; and therefore, unless they interfere, may sue a stranger who either injures the property, or dispossesses him. 7 T. R. 296. 7 T. R. 391. 1 B. & P. 44. — 6. An uncertificated bankrupt may maintain an action of *assumpsit* against a third person for work and labour. Co. Bt. Laws, 431. and for work and labour, and materials furnished necessary to his labour. Esp. N. P. 140.; for the assignees cannot let out the bankrupt; they cannot contract for his labour. Per Ld. Mansfield, in Co. Bt. Laws, 431. — 7. And *assumpsit* for money lent and advanced by him after his bankruptcy; for it will be presumed, that the money was earned by him subsequent thereto. 1 Esp. N. P. 170. — 8. An uncertificated bankrupt may sue for the non-performance of a contract for the delivery of goods entered into by him subsequent to the bankruptcy, unless the assignees interpose. Holt, 179. — 9. The bankrupt cannot file a bill of redemption in respect of his right to the surplus; but when he has a clear interest, and the assignees refuse, they will be compelled, upon petition and offer of indemnity, to lend him their names. See 9 Ves. 77. — 10. A bankrupt cannot sue in his own name for the benefit of his creditors. 15 East, 622. — 11. An uncertificated bankrupt, employed by his assignees to work for the benefit of his estate, may sue them for work and labour. 4 Taunt. 754. — 12. Bankrupt's right to petition in respect of his interest in the surplus. 18 Ves. 61. — 13. The bankrupt, when attainted, cannot petition. 14 Ves. 452. — 14. Bankrupt allowed to maintain a bill for a discovery and account, in aid of his defence at law. 1 Mad. 423. — 15. A bill was filed for a discovery of the bankrupt's estate; a demurrer, because the bankrupt was not made a party, was allowed.

So, if a debt due to the bankrupt and another be assigned, they can not join in the suit. Adm. 1 Lev. 17, 18.

Yet a suit by a creditor for a debt (*i*), or an execution upon a judgment

2 Vern. 32. But it is now considered not necessary that a bankrupt should be made a party to a bill against his assignees. 5 P. Wms. 311. n. 3 Bro. 228. In the exchequer, cited 2 Ves. jun. 645. — 16. Whether the bankrupt can be made a party merely for discovery and to maintain an injunction, *quere*. 1 V. & B. 545. — 17. Demurrer to bill joining bankrupt with assignees in charges and prayer for relief, viz. the specific performance of a contract previous to his bankruptcy, allowed. 1 V. & B. 545. Distinction as to fraud. *Ibid.* — 18. Bankrupt may resume his trade, the goodwill of which has been sold, provided he does not hold himself out as carrying on the same identical concern. 1 Rose, 125. 17 Ves. 355.

(i) 1. The petitioning creditor was estopped from proceeding at law. 1 Atk. 152. *Ibid.* 153. 1 Bro. 270. — 2. Proof by another creditor was not considered a conclusive election to take under a commission; and a creditor has been suffered to make his election of proceeding at law against the bankrupt after having proved his debt, and received two dividends, upon condition of refunding what he had received. 1 Atk. 219. 220. 221. 3 Ves. 1. 1 Bos. & Pull. 424. 8 T. Rep. 364. Co. Bt. Law, 130. 11 Ves. 205. — 3. And if a creditor who had proved a debt under a commission, was put to his election by the court, and he elected to proceed at law, he was nevertheless allowed to prove his debt for the purpose of assenting to or dissenting from the certificate. 7 Vin. 154. 1 Atk. 219. 220. 221. 3 Bro. 216. 1 Atk. 83. Co. Bt. Laws, 135. 1 Ves. jun. 159. 14 Ves. 158. — 4. By stat. 49 Geo. 3. c. 121. s. 14. "It shall not be lawful for any creditor, who has or shall have brought any action, or instituted any suit against any bankrupt, in respect of any demand which arose prior to the bankruptcy of such bankrupt, or which might have been proved as a debt under the commission of bankrupt issued against such bankrupt, to prove a debt under such commission for any purpose whatever, or to have the claim of a debt entered upon the proceedings under such commission, without relinquishing such action or suit, and all benefit from the same; and the proving or so claiming a debt under a commission of bankrupt by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed by him; provided always, that such creditor shall not be liable to the payment to the bankrupt or his assignees, of the costs of such action or suit which shall be so relinquished by him; and provided also, that where any such creditor shall have brought any action or suit against any such bankrupt jointly with any other person or persons, his relinquishing such action or suit against such bankrupt or bankrupts, shall not in any manner affect such action or suit against such other person or persons." — 5. Upon a creditor electing to come in under the commission, he must give up proceedings at law. 1 Rose, 184. — 6. Hence, upon petitioning to prove, he must discharge the bankrupt from custody. 2 Rose, 421. — 7. But proving under the commission is in itself a discontinuance of proceedings at law. 1 Rose, 394. 2 V. & B. 255. — 8. The creditor need not elect between the commission and proceedings at law, before the dividend. 11 Ves. 203. 14 Ves. 158. — 9. Except where a creditor, with a view to both remedies (the commission and proceedings at law), split an entire demand, and being assignee, delayed a dividend. 14 Ves. 587. See 1 Ves. 159. — 10. A creditor having the bankrupt in execution at the time of commission issued, may elect between the commission and proceedings at law. 15 Ves. 185. 11 Ves. 203. Cooke, 151. 1 Str. 653. — 11. Petitioning creditor cannot sue the bankrupt at law. 1 Atk. 152. 153. 154. — 12. Obtaining an order for an inquiry before the commissioners, is an election to come in under the commission. 1 Rose, 181. — 13. Petitioning that commission may be superseded, or if found valid that party may prove, is an election to come in under the commission. 1 Rose, 204. — 14. Proof upon one of two bills, is an election to relinquish a suit at law upon the other. 1 Rose, 98. 204. — 15. Holder of joint note of A. and B., suing out commission against A. and proving, then suing A. and B. at law; it was ordered, that unless he gave A. an indemnity against the costs and consequences of the action within a week, that A.'s name should be struck out. 1 Rose, 460. 1 V. & B. 546. — 16. If a bankrupt promises a creditor to pay him a certain sum, in consideration that he will not come under the commission, and the creditor afterwards petitions against the allowance of the certificate, it is a waiver of the agreement, and deprives the creditor of all claim to benefit under it. *Esq. Cas.* 282. — 17. But the being chosen assignee, will not prevent the creditor from

ment will be vain after the commission; for when recovered they will be liable to the commission. R. 2 Ca. Ch. 191.

By the st. 1 Jac. 15. an assignee shall maintain an action for a debt of the bankrupt in his own name. R. 2 Cro. 105.

And therefore it is sufficient for the assignee by his declaration to shew

from suing the bankrupt at law if he has not proved his debt. 1 Atk. 152. — 18. The creditor, by resorting to the commission, waives his personal remedy. 18 Ves. 341. — 19. Stat. 49 Geo. 3. c. 121. s. 14. takes away the creditor's right to charge the bankrupt's future effects, conferred in certain cases by the 5th Geo. 2. c. 30. s. 9. for the 49th Geo. 3. is general, without making any exception in favour of those cases, and saving the right conferred, &c. 3 M. & S. 78. — 20. The words "proving a debt under a commission, shall be deemed an election to take the benefit of such commission," must be taken to relate to cases where a party who has proved under a commission, sues the same person under whose commission he has proved. 16 East, 252. — 21. The election to prove under a commission of bankruptcy, only affects the rights of the party proving. If, therefore, the acceptor of a bill of exchange becomes bankrupt, and the indorsee proves under his commission, this election takes away, (by 49 Geo. 3. c. 121. s. 8.) his own right only of suing the bankrupt; so that if the bill is returned to, and paid by the indorser, he may sue the bankrupt thereon. 3 M. & S. 91. — 22. Cases upon the subject of a creditor retracting his election, to come in under the commission, previous to stat. 49 Geo. 3. c. 121. are, 2 Ves. 9. 4 Ves. 856. — 23. A mortgagee was refused leave to retract an election made erroneously, supposing his security to be of no value. 1 Rose, 96. — 24. In the case of an agent, who, without authority and without the knowledge of his principal abroad, took the bankrupt in execution; it was held an election. Co. Bt. Laws, 132. — 25. Taking the debtor in execution, from whatever motive, is an election to proceed at law. 15 Ves. 192. — 26. Attachment for money ordered to be paid in a suit instituted before bankruptcy, is not an election to proceed at law. 1 Buck, 41. — 27. Surrender in discharge of bail has not the effect of an election by creditor to proceed at law. 6 Ves. 146. and see 1 Rose, 145. 18 Ves. 231. — 28. An election by the creditor to proceed at law did, previous to stat. 49 Geo. 3. c. 121. prevent his taking a dividend; but he might still have assented to, or dissented from, the certificate. 1 Ves. 159. — 29. And a creditor having the bankrupt in custody on *meine* process, was permitted to vote in the choice of assignees, without being obliged to discharge the bankrupt. 11 Ves. 205. — 30. If, after a commission has issued, a creditor proceeds at law against a bankrupt, and takes his body in execution, it is, independently of the statute, a conclusive election; and he will not be entitled to prove so as to receive a dividend, although he should afterwards discharge the bankrupt out of custody. Co. Bt. Laws, 132. 15 Ves. 192. — 31. And where a creditor who had taken a bankrupt in execution subsequent to a commission, afterwards released him, and proved under the commission, the proof was expunged. Co. Bt. Laws, 135. — 32. Creditor, under the circumstances, competent to elect between the commission and a suit at law. 14 Ves. 493. — 33. Creditor having two distinct demands in different lights, cannot prove upon one and sue for the other. Stat. 49 Geo. 3. c. 121. s. 14. 1 Rose, 98. 184. 204. 5 Taunt. 174. Previously to the above stat. he might. See 1 Bro. 270. 1 Atk. 109. 5 Atk. 817. 14 Ves. 589. Cooke, 25. — 34. Though a creditor, on distinct transactions, may prove some of his debts under the commission, and sue at law for others. 5 Taunt. 174. — 35. A creditor cannot split a demand, and prove part under the commission, and prosecute a bankrupt at the same time for the remainder at law. 1 Atk. 109. 5 Atk. 816. 1 Bro. 269. — 36. Not even upon separate notes given by the bankrupt for distinct parcels of goods; for, if a creditor can comprise his whole demand in one action, he cannot be permitted to split it. 14 Ves. 587. 1 Atk. 152. — 37. And if a creditor makes a claim of part of his debt under a commission, and proceeds at law for the remainder, he shall be compelled to make an election. 14 Ves. 493. — 38. If a demand be upon simple contract, and the creditor has a security by an assignment of ships, and another by bond, this being only different securities for the same debt, the creditor cannot proceed at law upon the bond, and prove under the commission for the simple contract. 1 Bro. 269. — 39. So a mortgagee cannot take a dividend on a mortgage, and sue upon the bond; but if a mortgagee has a separate debt, which cannot be tacked to the mortgage, he may proceed differently for that debt. — 40. When a plaintiff, suing a bankrupt, elects to proceed under the commission, the defendant is entitled to a suggestion thereof upon the record. 6 Taunt. 549.

the debt due to the bankrupt, his bankruptcy, the commission, and assignment to him. Lut. 451.

And he need not shew, that he was declared a bankrupt by the commissioners. R. Lut. 455.

Or that he was indebted to the value of 100*l.*; for it shall be intended that the commission issued regularly. R. Lut. 456.

Or that there was a petition by a creditor to the chancellor. R. Lut. 456.

Or that notice of the assignment was given to the debtor. R. Lut. 456. (*k*)

Or how he became a bankrupt. Q. Sho. 7. R. Carth. 29.

But now it is sufficient to declare shortly, without shewing the commission, and assignment at large. R. after verdict. Lut. 277.

So the assignee shall maintain an action, where the contract was made; for the privity of contract is assigned. 1 Sand. 239.

In debt upon bond, there is no need of a *profert* of the deed; for perhaps it is not in the assignee's hands. R. Cro. Car. 209.

But an action by an assignee does not alter the nature of the debt; and therefore he cannot have debt against an executor or administrator upon simple contract. R. Cro. Car. 187. Jon. 223.

So it does not prejudice the defence of the defendant. And therefore, in debt upon simple contract he shall wage his law. R. Cro. Car. 187. R. 2 Cro. 105.

So the defendant may plead *non assumpsit* to the bankrupt within six years, where the promise is alleged to the bankrupt himself, and not to the assignee. Per Holt, Mod. Ca. 131. (*l*)

(*k*) Vide supra.

(*l*) As to the *proofs* in suits by and against assignees, they may be treated under the following relations. — *First*, without reference to 5 G. 2. c. 30. s. 41, or to 49 G. 3. c. 121. s. 10. the former making the commission and proceedings evidence; in case of witness's death; the latter making the commission and proceedings evidence, in case notice of disputing the bankrupt is not given. — *Secondly*, with reference to 5 G. 2. c. 30. s. 4. — *Thirdly*, with reference to the rule previous to or independent of 49 G. 3. c. 121. s. 10. — *Fourthly*, with reference to 49 G. 3. c. 121. s. 10. *Lastly*, with reference to the competency, as witnesses, of the bankrupt, his wife and creditors. And, *First*, without reference to 5 G. 2. c. 30. s. 41, or to 49 G. 3. c. 121. s. 10. — 1. A verdict upon an issue out of chancery, to which only one of the defendants was party, may be read against all the defendants, to prove the time of the act of bankruptcy. B. N. P. 40. — 2. Vide supra, that where the act and commission are of the same date, evidence is admissible to show that the act was complete at an earlier period of the day. — 3. As to what particular circumstances shall be proof of keeping house. See 1 Esp. 381. — 4. To prove an act of bankruptcy by lying in prison upon civil process for debt, the prison books are not sufficient evidence of the cause of the commitment, if the *commititur* is in existence; although they may be evidence to prove the period of the commitment and discharge. 3 B. & P. 188. — 5. A witness's deposition before the commissioners, may be used as a memorandum to refresh his memory, and, with that view, read over to him. 1 Esp. 440. — 6. So much of an examination at a private meeting taken down by the solicitor, as in his judgment appeared relevant, read over to and signed by the witness, is evidence against him. 4 Esp. 172. — 7. And the judge at N. P. cannot refuse to receive in evidence an examination signed by a defendant, although it appears that he was improperly examined before the commissioners, upon a subject unconnected with the interest of the bankrupt's estates. 4 Camp. 10. — 8. Nor will a defendant charged with his confession in a deposition before the commissioners, be allowed to explain it by parol evidence. 2 Str. 796. — 9. Where the bankruptcy was by a fraudulent sale, the vendee's examination before the commissioners, admitting the execution of the deed, was in trover by the assignees against him, held to supersede the necessity of calling the attesting witness.

§ T. R. 366.—10. If goods are taken in execution after an act of bankruptcy, and assigned by the creditor to the landlord of the premises, the examination of the execution creditor cannot be read in evidence in trover by the assignees against the landlord, to shew the execution creditor's knowledge of the act of bankruptcy. 1 Stark. 50.—11. Upon a bill brought by the assignees, to set aside a fraudulent assignment of an annuity from the bankrupt to the defendant, as being made for no consideration, and subsequent to the act of bankruptcy; the examination of the defendant's attorney, taken before the commissioners who acted in the commission against the bankrupt, cannot be read as evidence of such fraud and act of bankruptcy, unless he has been examined in chief in the cause. But the defendant's examination taken before the commissioners may be read to contradict the answer to the bill. 5 Atk. 415.—*Secondly, With reference to stat. 5 Geo. 2. c. 30. s. 41.*—12. The mode of signing and attesting the depositions is not stated by the statute; but it seems that they must be so notified by the officer who enters them upon record. 2 Mont. note 5 B.—13. They are not, as evidence, restricted to purchasers. Dougl. 257. 4 Burr. 2235.—14. The assignees, upon suspicion of collusion between the bankrupt and petitioning creditor, to invalidate the commission, may have the depositions of the proof of the petitioning creditor's debt, and of the acts of bankruptcy, and of the bill of exchange referred to in the petitioning creditor's deposition, entered of record. 2 Rose, 138.—15. A deposition, stating an admission by the bankrupt, of having committed an act of bankruptcy, is not sufficient, unless shewn to have been contemporaneously with, or immediately subsequent to the act. 1 Stark. 353.—16. The depositions are evidence to prove the precise time of the act of bankruptcy. Dougl. 257.—*Thirdly, With reference to the rule, previous to or independent of stat. 49 Geo. 3. c. 121. s. 10.*—17. Defendant pleaded to an action by the assignees; and held, that not having applied for leave to withdraw his plea, and plead *de novo*, he could not compel the plaintiffs to prove the trading, &c. 2 Camp. 184, 184. n.—*Fourthly, With reference to stat. 49 Geo. 3. c. 121. s. 10.*—18. The commission and proceedings are inadmissible evidence of an act of bankruptcy, for the purpose of defeating a conveyance. 2 Rose, 364.—19. But in an action by the assignees, the deposition of the petitioning creditor before the commissioners, is sufficient evidence of the debt, if notice is not given; although he could not be a witness at law. 2 Camp. 495.—20. Notice is not requisite where the commission incidentally comes in question in a cause between strangers. 4 Taunt. 741.—21. But an action by the bankrupt against his assignees, disputing the commission, is within the statute. 1 Rose, 51. 3 Taunt. 526. 3 Camp. 251. 3 Camp. 424.—22. Though, however, they must, independently of notice, be presumed to know, that the bankruptcy is to be disputed. 1 Rose, 51.—23. Nor are cases, which otherwise would be within, excluded from the operation of the statute, forasmuch as the assignees are not described as such upon the record. 3 Camp. 251.—24. The statute extends to cases where servants of the assignees are joined with them in the action. 2 Stark. 182.—25. Notice served by plaintiff at the time when the issue is delivered with notice of trial, is too late. 4 Camp. 207.—26. A defendant who has pleaded without notice, cannot, even before the time for pleading has expired, re-deliver his plea with notice. He must move to withdraw his plea, and plead *de novo*, giving, as he may do, whether at law or in equity, notice with the second plea. 1 Stark. 328. 1 Wight. 180. 1 Ves. & Beam. 221. 1 Mer. 6. supra.—27. Service of the notice must be personally, either upon the party (conducting his own cause) or his attorney: service upon a servant will not do. 3 Taunt. 526.—28. If the notice refers only to the act of bankruptcy, and depositions upon the file of the proceedings are read to prove the trading, and petitioning creditor's debt, the whole of the proceedings are not to be considered in evidence; to entitle the plaintiff to inspect other depositions, he must call for them as part of his case. 4 Camp. 191.—29. The notice is not to be considered as part of the defendant's case, but may be proved as soon as the assignees attempt to make out a *prima facie* case, by producing the commission. 2 Camp. 324.—30. Where no notice is given, the bankruptcy is sufficiently proved by putting in the proceedings under the commission, and shewing that they came out of the hands of the solicitor; or, where the solicitor has been changed, by proving the signature of one of the commissioners. 3 Camp. 30.—31. Where notice is not given, the proceedings are only *prima facie* proof; and their effect, therefore, may be invalidated by contrary proof. 2 M. & S. 556. 3 Camp. 424. 1 Mer. 6. note. 1 Holt, 190. accord.; but 1 Rose, 226. at N. P. contra. Vide infra.—32. The court is not precluded from saying that the proceedings do not disclose a sufficient act of bankruptcy. 1 Holt, 190.—33. And evidence may, without notice, be called to prove, that the requisites upon the proceedings, to support the commission, are insufficient. 1 Rose, 226. 3 Camp. 425. 2 M. & S. 557. 1 Holt, 190. Vide supra.—*Lastly, with reference to the competency, as witnesses, of the bankrupt,*

(D 30.) Distribution. — Shall be equal.

By the st. 13 El. 7. the commissioners may sell the lands, goods, &c. of a bankrupt, or otherwise dispose the same, for satisfaction of the creditors, *viz.* to every of the creditors a portion, rate and rate-like, according to the quantity of his debt.

And therefore, there shall be an equal (*m*) distribution for the benefit of all the creditors, who are contributory, in proportion to their respective debts. R. 2 Co. 25. b.

If

his wife and creditors — 34. The bankrupt cannot be a witness to prove any fact to support the commission, such as the act of bankruptcy, the trading, or the petitioning creditor's debt. 2 H. B. 279. Ibid. B. N. P. 41. 2 Str. 829. — 35. Whether certificated or not. 2 H. B. 279. — 36. Nor can any release restore his competency. 2 Str. 829. 5 E. p. 187. 4 Bro. 454. 1 Esp. 287. 5 Esp. 22. accord. 1 Mont. 407, n. (a) contra. — 37. Nor can a certificated partner be called to support the joint commission. 2 H. B. 279. — 38. If, however, the defendant calls the bankrupt, he waives all objections to his competency, who may therefore be cross-examined in support of the commission. B. N. P. 58. — 39. Though it has been ruled, that a bankrupt called by the plaintiff cannot be examined as to any matter necessary to support the commission, either in cross-examination, or examination in chief. 5 Esp. 187. — 40. Neither are the bankrupt's declarations respecting his own motives, evidence of the act of bankruptcy, unless before, or contemporaneous therewith. B. N. P. 41. 5 T. R. 512. Annaly, 267. 4 Esp. 253. 1 Taunt. 479. — 41. Hence, what the bankrupt says when he is removing his books or goods, is evidence. Annaly, 267. — 42. The bankrupt's confession to a third person, that he had gone out of the way to avoid being arrested, has been held to be evidence. B. N. P. 41. 5 T. R. 512. — 43. The bankrupt cannot be a witness to explain an equivocal act of bankruptcy. Mont. B. L. 482; overruling 1 Esp. 287. — 44. Nor can he be examined as to an act of bankruptcy previous to that upon which the commission issued. 5 Esp. 187. — 45. The wife cannot be examined touching her husband's bankruptcy. 1 P. Wms. 611. Vide *infra*. — 46. A creditor is incompetent to support the commission, and therefore to prove the act of bankruptcy. Peake, 80. 2 Ves. & Beam. 177. 1 Rose, 587. 392. 2 Rose, 27. 3 Camp. 534. 2 Rose, 28. Cooke, 105. 12 Vin. 11. C. T. H. 267. 1 Mont. 409, n. (p); see 1 Taunt. 78. — 47. Even though he has not proved. Cooke, 523, accord. 2 Camp. 301. contra. — 48. The petitioning creditor at least, is incompetent to support the commission. 2 Camp. 411. — 49. Though he is competent to invalidate it. Ibid. 1 Stark. 40. 2 Sch. & Lef. 116. — 50. He may likewise be called by the assignees (plaintiffs) to produce the bill of exchange which constitutes his debt; though he cannot be examined or cross-examined. 1 Stark. 131. — 51. The act of bankruptcy cannot be proved by a creditor who is the subscribing witness to a deed. 1 Mont. 409, n. (p). — 52. A release, however, by the creditor, of his debt, will restore his competency. Ca. T. H. 267. — 53. Which may be given to the assignees. Ibid. — 54. To be incompetent, as being a creditor, the party must be proved such. 2 Rose, 350. — 55. If, too, the objection to the creditor's competency is not taken before the commissioners at the first meeting (the question arising in their proceedings) it cannot afterwards be urged to invalidate the commission, whether in a civil or criminal case. 1 Mont. 89, n. (s). 1 Taunt. 78. — 56. A creditor may prove those circumstances of the act of bankruptcy, created by stat. 4 Geo. 3. c. 55, which he alone can prove; but those only. 2 Rose, 203.

(*m*) 1. Landlord may, on his tenant's bankruptcy, distrain goods upon the premises for his whole arrear of rent, notwithstanding commissioners assignment, or even sale by assignees. 1 Atk. 103. 104. — 2. So if a trader, after an act of bankruptcy, rent premises, the landlord may distrain his goods for rent in arrear. 2 T. R. 600. — 3. If the goods are sold by the assignees, and taken off the premises, the landlord loses his remedy by distress, and can only come in under the commission, *pro ratâ*, with the rest of the creditors. 1 Atk. 103. — 4. And where a tenant, who became a bankrupt, owed the landlord twelve years rent, and the landlord proved his debt under the commission, and permitted the assignees to sell the goods to a third person, who took possession of the goods and lived upon the same premises as the bankrupt

If partners agree, that their several debts shall not charge the joint stock, and afterwards become bankrupts, and have several creditors, and also

bankrupt did, and the landlord three years after proving his debt, distrained upon the goods as being still upon the premises; the vendee of the goods under the assignees was held entitled to the goods. 1 Atk. 103. — 5. So where a landlord distrained for rent, and the tenant replevied the goods; and whilst the cause in replevin was pending, the tenant and the sureties in the replevin bond became bankrupts, and the assignees of the tenant possessed themselves of the goods replevied, and sold them, the landlord was held to have lost his lien. 1 Bro. 427. — 6. A landlord cannot distrain for rent, and come in under the commission at the same time; he must make his election either to wave his proof, or his distress. 1 Atk. 104. — 7. And it was formerly considered, that a landlord's proving his debt was no determination of his election, and that he might afterwards distrain the goods remaining upon the premises, and waive his proof in like manner as a common creditor. Ibid. — 8. *Quare*, if stat. 49 Geo. 3. c. 121. s. 14. has made a difference. — 9. If the landlord neglects to distrain, he is not entitled to be paid a year's rent in preference to the other creditors, on the equity of the stat. 8 Anne, c. 14. which, in case of execution of the goods of the tenant, gives the landlord a year's rent. Co. Bt. Laws, 177.; and see 1 Atk. 103. — 10. Rights of a landlord, when petitioning creditor, queried in 2 Rose, 424. — 11. A tax-gatherer, or other public agent, is to be considered in the same light with private creditors. 2 Taunt. 401. — 12. It is stated in 1 Atk. 103, that a mortgagee of a bankrupt's estate, though he pays the arrears of rent that is due to the bankrupt's landlord, unless he applies to the court for an order that he may stand in the place of the landlord, in consideration of his paying the arrears of rent, shall not be preferred to the creditors under the commission. But Mr. Cooke observes, that it rather seems no such order could be obtained, because unless the landlord actually distrains, he has himself no lien upon the goods. Co. Bt. Laws, 180. — 13. Where a constable became bankrupt, having money in his hands, the produce of goods sold by him levied under a distress for rent, and the tenant died, his executor ordered to come in as a creditor with the rest. 7 Vin. Abr. 74. — 14. Priority of creditors, under subsequent commission, against uncertificated bankrupt, queried in 2 Rose, 179. — 15. A. becomes bound as surety with B. in a *respondentia* bond, upon a ship bound to the East Indies, conditioned to be void upon payment within thirty days after arrival in the river Thames, or at the end of thirty-six calendar months, or upon an utter loss. B. assigns all his goods on board the ship to A. upon trust; in the first place, to pay a debt owing from himself to A.; and in the next place, to pay off all the debts for which he had become surety on the *respondentia* bond. Before the time specified in the bond, A. becomes bankrupt, the assignees receive a sum of money on account of the proceeds of the goods. It was ordered, that after deducting the amount of A.'s private debt, the residue of the proceeds, and all future receipts, should be divided among the *respondentia* creditors only. 1 Rose, 130. — 16. The commissioners under the 51st Geo. 3. c. 15. for issuing exchequer bills to manufacturers, &c. admitted, under the 48th section of the act, to prove (by their secretary) the full amount of their principal, with interest up to the complete payment of the principal, in preference to all other creditors of the bankrupt. 1 Rose, 173. 18 Ves. 436. — 17. By stat. 33 Geo. 3. c. 54. s. 10. for the encouragement and relief of friendly societies, it is provided, that if any person appointed to any office by any society regulated according to the provisions of the act, and being entrusted with, or having in his hands or possession, any monies or effects belonging to such society, or any securities relating to the same, shall die or become a bankrupt, or insolvent, his executors or administrators, assignee or assignees, shall, within forty days after demand made by the order of any such society, or the major part of them assembled at any meeting thereof, deliver over all things belonging to such society, to such person or persons as such society shall appoint, and shall pay out of the assets or effects of such person all sums of money remaining due, which such person received by virtue of his said office, before any of his other debts are paid or satisfied; and all such assets or effects shall be bound to the payment and discharge thereof accordingly. — 18. The act only applies to cases where the officer of the friendly society has, by virtue of his office, been entrusted with the monies and effects of the society. 1 Buck, 214. — 19. Hence, it does not extend to a person to whom the money of the society has been paid as a banker, or to whom money has been lent by them upon security, paying interest. 6 Ves. 98. 141. 804. And money lent to a treasurer duly

also upon the joint stock, the creditors upon the joint stock shall not be preferred to the several creditors, but they shall be all equal; for the agreement shall take effect between themselves, and not against the creditors. R. 2 Ca. Ch. 139.

(D 31.) At what time, &c.

By the st. 1 Jac. 15. if after the commission sued forth, and dealt in, the bankrupt die before distribution, yet the commissioners may proceed in execution of the commission.

If the commissioners have taken contribution of any creditor, the commission is dealt in. 2 Ca. Ch. 193.

But by the st. 1 Jac. 15. the commissioners cannot proceed to distribution, till four months expired. (n)

(D 32.) The

duly appointed, upon his promissory note, is not within the operation of the act; for the preference is given only in respect of money which got into the hands of officers independent of contract. 15 Ves. 280.—20. Where money was paid to trustees as trustees, and they gave separate notes for it, and voluntarily agreed to pay interest for the purpose of serving the society; held, that the money being paid to them as trustees duly appointed, their agreeing to pay interest as stated, did not alter the case so as to make the money in their hands a loan to them; and the claim was allowed. Whitm. 297.

(n) 1. Assignees are to be allowed in their accounts, and may retain all sums paid in issuing and prosecuting the commission, and all just allowances on account of their being assignees. And the commissioners must order such part of the neat produce of the bankrupt's estate as by the assignees' accounts or otherwise shall appear to be in the hands of the assignees, as they think fit, to be forthwith divided amongst such of the bankrupt's creditors who have duly proved their debts under the commission, in proportion to the quantity of their several debts. The commissioners must make their order for a dividend in writing under their hands, and cause a part of such order to be filed amongst the proceedings under the commission, and deliver to each of the assignees a duplicate of such order likewise under their hands. The order of distribution must contain an account of the time and place of making it, and the sum total of all the debts proved under the commission, and the sum total of the money remaining in the hands of the assignees to be divided, and how much in the pound is then ordered to be paid to every creditor under the commission. The assignees in pursuance of such order, and without any deeds of distribution for that purpose, must forthwith make such dividend accordingly, and take receipts in a book to be kept for that purpose; and such order and receipt will be a full discharge to the assignees, for so much as they shall fairly pay pursuant to such order. 5 Geo. 2. c. 30. s. 33.—2. It is the duty of assignees to apply to the commissioners to make a dividend; they are bound to make it within a certain time, but the precise time must rest with them. 1 Bro. 385.—3. At the meeting for making a dividend, the assignees are to produce to the commissioners and creditors then present, fair and just accounts of their receipts and payments, touching the bankrupt's estate and effects, and of what shall remain outstanding, and the particulars thereof; and shall, if the major part of the creditors then present require the same, be examined upon oath or affirmation before the major part of the commissioners, touching the truth of such accounts. 5 Geo. 2. c. 30. s. 33.—4. By 49 Geo. 3. c. 121. s. 5. "for the purpose of ascertaining in what manner the money which shall from time to time come to the hands of such assignee or assignees has been employed, the commissioners shall in no case declare a dividend upon admission only of a certain sum in the hands of the assignees, but shall require such assignee or assignees to deliver upon oath a true statement in writing of all the sums of money received by such assignee or assignees, and when received by him or them respectively, and on what account, and how employed, and shall examine such statement and compare the receipts with the payments, and ascertain what balances have been from time to time in the hands of such assignee or assignees respectively, and shall inquire for what reason any sum appearing to be in the hands of such assignee or assignees ought to be retained, and thereupon shall declare a dividend on the remaining sum, specifying in their order the sum so allowed to be retained, and the grounds on which they may conceive it proper that the same should be retained; and

(D 32.) The advantages of the bankrupt. — He shall have information how his estate is disposed.

By the st. 13 El. 7. and 1 Jac. 15. the commissioners shall on the bankrupt's

and not divided amongst the creditors." — 5. After the expiration of four months, and within twelve months from the time of issuing the commission, the assignees must cause at least twenty-one days notice to be given in the London Gazette, of the time and place of meeting, for the commissioners to make a dividend. And the meeting for the city of London, and all places within the bills of mortality, must be at Guildhall. 5 Geo. 2. c. 30. s. 33. 14 Ves. 590. — 6. Second dividend to be made within eighteen months after issuing the commission. Stat. 5 Geo. 2. c. 30. s. 37. — 7. It is in the chancellor's discretion to postpone the dividend; but he refused under the circumstances. 1 Rose, 17. 17 Ves. 514. — 8. Not before the expiration of the four months. 1 Atk. 106. St. 1 Jac. 1. c. 15. s. 4. 5 Geo. 2. c. 30. s. 33. — 9. If the assignees, after the expiration of four months, refuse to make a dividend, the lord chancellor will, upon petition, order them to attend the commissioners at a meeting appointed for that purpose, and direct them to declare a dividend, if, upon examining the accounts, and the assignees upon oath, they find there is a sufficient fund. 1 Atk. 91. — 10. Where it appears to the commissioners, that the directions of the act relating to making a dividend, have not been complied with, they may cause due notice to be given in the London Gazette, and such other papers as they may think proper, of a time and place for the assignees to attend, to shew cause why a dividend has not been made agreeably to the directions of the act; and the commissioners may appoint a time and place when and where they will meet to make such dividend, and they must cause due notice to be given of such meeting. General Order, 8th March, 1794. — 11. It seems, that the application to the lord chancellor to compel assignees to make a dividend, ought not to be made until an unsuccessful application has been made to the commissioners for that purpose under the General Order, 8th March, 1794; or the assignees refuse to obey the commissioners' order to make a dividend. — 12. The assignees cannot withhold a dividend declared. 1 Rose, 319. — 13. Though claimed by a third person, he not having petitioned within a reasonable time after claim. 1 Mad. 605. — 14. Assignees resisting payment of a dividend upon an objection to the debt, should petition to expunge the proof. 1 Rose, 319. — 15. Creditor petitioning for payment of a dividend, it was ordered with interest and costs; assignees not being prepared to state their objection. 1 V. & B. 13. — 16. Formerly, after an order for a dividend was made by the commissioners, the creditor might obtain payment either by petition to the lord chancellor, or by bringing an action of assumpsit. 1 Atk. 90. Doug. 392. Co. Bt. Laws, 521. 6 T.R. 548. — 17. Respecting the controul over the action for a dividend previous to st. 49 Geo. 3. c. 121. see 2 Sch. & Lef. 229. — 18. But now, by st. 49 Geo. 3. c. 121. s. 12. "from and after the passing of this act, no action shall be brought by any creditor or creditors who have proved or shall prove any debt under any commission of bankrupt, against the assignee or assignees of the estate of such bankrupt, for the amount of any dividend declared by the commissioners under such commission; but in all cases in which the assignee or assignees of any bankrupt shall refuse or omit to pay any dividend declared under any commission of bankrupt, it shall be lawful for the creditor or creditors entitled to the same, to petition the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, for payment thereof; and it shall be lawful for the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, on hearing such petition, not only to order the payment of such dividend, but also in all cases in which it shall appear to him or them that the justice of the case shall require it, to order payment of interest for the time that such dividend shall have been withheld, and of the costs of the application." — 19. By stat. 5 Geo. 2. c. 30. s. 37. within eighteen months next after the issuing of the commission, the assignees must make a second dividend; and shall cause a notice to be inserted in the London Gazette, of the time and place the commissioners intend to meet to make a second dividend, and for the creditors who shall not before have proved their debts, to come and prove the same; and at such meeting the assignees shall produce upon oath or affirmation their accounts of the bankrupt's estate; and what upon the balance thereof shall appear to be in their hands, shall, by the like order of the commissioners,

bankrupt's request declare to him, how they have disposed his lands, goods, &c. and pay him the overplus (o), if any be. (p)

(D 33.) Shall not be arrested, when he attends the commission.

So by the st. 5 Geo. 24. it is declared, that the bankrupt going to, staying with, or coming from the commissioners on summons, is not liable to an arrest for a debt, or on an escape warrant; but on shewing such summons, and proving it signed by the commissioners, and giving a copy of it, the officer shall discharge him, and pay him 5*l.* a day, if he do not.

So by the st. 5 Geo. 2. 30. in coming to surrender, or after surrender till the time allowed for finishing his examination, unless in prison before. (q)

(D 34.) Shall

missioners, be forthwith divided amongst such of the bankrupt's creditors who shall have made due proof of their debts, in proportion to their several debts; which second dividend shall be final, unless any suit at law or in equity shall be depending, or any part of the estate standing out, that cannot be disposed of; or that the major part of the creditors shall not have agreed to be duly sold; or unless some other or future estate or effects of the bankrupt shall afterwards come to or vest in the assignees; in which case the assignees shall, as soon as may be, convert such future or other estate and effects into money, and shall, within two months next after the same shall be converted into money, by the like order of the commissioners, divide the same amongst such bankrupt's creditors who shall have made due proof of their debts under the commission.

(o) Vide infra. (P).

(p) 1. Inquiry concerning the management of his estate, will be refused to a bankrupt, if he has no pecuniary interest therein. *Ex-parte Harrison*, 1 Buck, 246. — 2. To enable the bankrupt to make a full and true discovery of his estate and effects, by sect. 5. of the stat. of Geo. 2. he is at liberty, at all reasonable times before the expiration of the forty-two days, or the enlarged time, to inspect his books, papers and writings, in the presence of the assignees, or some person appointed by them; and to take with him, for his assistance, such persons as he shall think fit, not exceeding two at any one time; and to make such extracts and copies as he shall think fit. — 3. Bankrupt may claim a list of debts proved. 1 Rose, 33. 17 Ves. 574. — 4. The bankrupt's right to inspect his books and the proceedings (and to retain wearing apparel,) does not depend upon his conduct or views. 1 Rose, 33. 17 Ves. 574. — 5. Inspection of proceedings to bankrupt disputing commission, will be refused. 14 Ves. 513. — 6. Bankrupt not permitted to falsify in master's office accounts long settled by commissioners, though palpable errors specifically pointed out by a short petition will be rectified. 6 Ves. 485. — 7. Bankrupt will be restrained from repeated attempts to supersede his commission, amounting to vexation; a second action, however, not considered vexatious. 1 V. & B. 506. 2 Rose, 1. — 8. Injunction against a bankrupt vexatiously disputing his commission. 17 Ves. jun. 393. — 9. Neither at law nor in equity, is it competent to a bankrupt to impeach his commission, by proving a prior act of bankrupt and petitioning creditor's debt. 1 Taunt. 71. Nor for any person claiming under him. 9 East, 21. 2 Smith, 448. 2 M. & S. 123. See 14 Ves. 452. — 10. The appropriate mode for bankrupt to dispute his commission, is by action; and charging collusion between assignees and a debtor, by petition to remove them. 3 Mad. 158.

(q) 1. The stat. 5 Geo. 2. c. 30. s. 5. expressly excepts the case where a bankrupt is in custody at the time of his surrender and submission to be examined. A principal being always considered as in the custody of his bail, where a bankrupt was taken by his bail while under examination, he was held not entitled to the privilege. 1 Atk. 238. — 2. Bankrupt imprisoned, at date of protection, is not privileged from subsequent detainers. 1 Mer. 176. 2 Rose, 343. — 3. Before the stat. 49 Geo. 3. c. 121. s. 14. where a creditor who had proved, arrested the bankrupt, the courts of common law would not interfere. 1 B. & P. 424. 3 T. R. 364. — 4. And where a defendant at law, having lain two months in prison,

(D 34.) Shall be discharged from other debts.

And though, by the st. 13 El. 7. the creditors, not fully satisfied, might have a remedy for the residue of their debts against the bankrupt, in like manner as they should have had before that act: and should be barred only of such part of their debts as should be satisfied by order of the commissioners.

Now by the st. 4 & 5 Ann. 17. a bankrupt, who shall surrender himself to the commissioners, and shall in all things conform to the direc-

was made a bankrupt, and discharged under a *supersedeas*, the plaintiff not having proceeded for two terms: the plaintiff then proved his debt under the commission, and before a dividend, took the bankrupt in execution in a fresh action: the bankrupt's petition for an order on the plaintiff to release him was dismissed. 3 Ves. 1. — 5. Till actual surrender, a bankrupt is protected during such time only as it might be reasonable and convenient for him to come in and submit himself. Cowp. 156. — 6. One, who was a bankrupt, came from Holland with intent to surrender himself on the forty-second day; but hearing that the time was enlarged, resolved not to surrender until the enlarged day. In the mean time he was arrested, and held, that he was not protected. Cowp. 156. — 7. Where a bankrupt, before he received a summons from the commissioners, delivered his keys and effects to the messenger, and promised to submit to the directions of the act, and about an hour after he had been served with the commissioner's summons to surrender, was arrested at his house on the first day appointed for his surrender. Upon petition to the lord chancellor to be discharged, his lordship considered what the bankrupt had done (and which was all that he could then do) was a compliance with the act, and that he ought to be discharged. But he dissuaded the bankrupt from suing the officer for the penalty, and the order was made by consent. Davies, 163. — 8. Bankrupt is exempt from arrest by surrender at a private meeting. 1 Rose, 46. 18 Ves. 1. — 9. The bankrupt's protection from arrest continues for the period allowed for examination, or enlarged by commissioners. 3 V. & B. 23. 1 B. & P. 150, accord. 15 Ves. 1. 1 Buck. 80. dub. — 10. A bankrupt attending a dividend meeting, several years after his last examination, is privileged from arrest. 5 Esp. 117. — 11. The bankrupt's exemption from arrest extends to all modes of arrest for debt, whether in law or equity. 1 Sch. & Lef. 169. — 12. And to those who have become creditors as well since as before the bankruptcy. 5 T. R. 209. — 13. The bankrupt's exemption from arrest extends to a crown extent, during actual attendance upon commissioners, but not during intervals of adjournment. 1 Rose, 278. 2 V. & B. 391. 2 Rose, 22. — 14. Illegality of bankrupt's arrest vitiates detainers, though lodged previously. 1 Rose, 260; see 17 Ves. 334. — 15. A bankrupt attending under and by virtue of the authority of the commissioners, is protected, though without any regular summons. 8 T. R. 534. — 16. Bankrupt's last examination having been adjourned *sine die*, he is protected from arrest in voluntary attendance to be examined, given at a meeting for a different and distinct purpose. 1 Rose, 260. — 17. Necessary deviations by the way to surrender, are justifiable. 11 Ves. 556. 15 Ves. 116. — 18. The court will not discharge a bankrupt on common bail, where the commission appears to be grossly fraudulent. 2 Blk. 725. — 19. Bankrupt having escaped from prison, is not privileged from recaption upon return from surrendering, under an order enlarging the time. 14 Ves. 36. — 20. Where a bankrupt, applying to be discharged out of the custody of a sheriff, is unable to bear the expence of being brought up by *habeas corpus*, the court will dispense with it, and grant a rule *nisi* for his discharge. 1 T. R. 369. — 21. Motion to discharge bankrupt from arrest, is the appropriate course, and time to answer affidavits refused. 1 V. & B. 316. — 22. Petition not motion is the form of obtaining bankrupt's discharge, when arrested upon return from surrendering at a private meeting. 1 Rose, 230. — 23. Order for bankrupt's discharge, arrested during prolonged period for surrender, must be upon plaintiff, not jailor. 15 Ves. 1. — 24. Order for bankrupt's discharge immediately, by the party in the first instance, if disobeyed, to be extended to the officer, with costs. 1 V. & B. 316. — 25. Certificated bankrupt not discharged without time given to plaintiff to shew that certificate was fraudulently obtained. 1 Buck, 5. — 26. Application lies, if necessary, for process against the officer for a contempt. 1 Atk. 55. 7 Ves. 312. — 27. And it seems that person undertaking to indemnify the officer, will be guilty of a contempt. 7 Ves. 312. 8 Ves. 104.

tions of that act, (*viz.* as to the discovery of his effects, or being apprehended within thirty days after notice of the commission left at his usual abode, and published in the Gazette, by a warrant from a judge or justice of peace, shall then conform, &c.) shall be discharged from all debts by him owing at the time when he became bankrupt. So by the st. 5 Geo. 24.

And by the st. 5 Geo. 24. he shall not be arrested for debt, or upon an escape warrant, if he attends the commissioners, or in going to, or from them, but on shewing to the officer the commissioners summons, shall be discharged, on pain of *5l. per diem* to the bankrupt's own use.

By the st. 7 Geo. 2. 31. the bankrupt shall be discharged from all bonds, notes, securities, &c. payable at a future day, as if the money had been due and payable before he became bankrupt. (r)

But

(r) 1. No debt can be barred by the certificate, unless contracted with certainty before the bankruptcy, &c. 3 Wils. 13. — 2. For debts proveable under the commission, and debts to be discharged by the certificate, are convertible terms. 1 Atk. 119. 2 B. & P. 1. — 3. A certificate discharges a bankrupt from a debt accruing before the commission, though judgment thereon be not obtained until after certificate allowed. Cowp. 25. — 4. Though a bond to secure an annuity is discharged by the certificate, yet a covenant in respect of subsequent breaches is not. 10 Ves. 351. See stat. 49 Geo. 3. supra. — 5. Grantor of annuity becomes bankrupt. The annuity is set aside for a defect in the memorial, after he has obtained his certificate. This is a bar to an action by the grantee to recover back the consideration. 6 Esp. 98. — 6. Certificate discharges attachment against, executor for nonpayment of money. Cooper, 198. — 7. If A., at the instance of a trader, accepts a bill payable to his order, not having any effects of the trader in his hands, and the trader becomes bankrupt before the bill is due, and A. pays it when due to an indorsee, the certificate is no discharge. Dougl. 166. — 8. If A. gave his promissory note to a trader, and also an ordinance debenture as a collateral security, and the trader pledge the debenture, and the note being indorsed by him, is paid by A. when due, and afterwards the trader becomes a bankrupt, and then A. redeems the debenture, and brings an action against the bankrupt for what he pays for such redemption, the bankrupt's certificate may be pleaded in bar to the action. Dougl. 167. — 9. The payee of a bill, for the drawer's accommodation, gets it discounted, and hands over the money to the drawer. Before the bill falls due, the drawer becomes bankrupt, and obtains his certificate. The bill is dishonoured when due, the payee refunds, and sues the drawer. The certificate is no bar. 1 H. Blk. 640. — 10. A *cognovit*, unlike a warrant to confess judgment, is not discharged by bankruptcy and certificate. 2 Taunt. 68. — 11. If the cause of action arises before bankruptcy, interest and costs accrued since are likewise discharged. Cowp. 138. — 12. The bankrupt is discharged from the costs when discharged from the debt. 2 N. R. 190; but see *ibid.* 191, n. 11 Ves. 646. — 13. Costs in the action bear relation to the original debt, and are reckoned parcel of it; if, therefore, the debt is discharged by the debtor having become a certificated bankrupt, so are the costs. Costs in error have the same relation as costs in the action; hence, where defendant became bankrupt pending an action of debt, in which judgment was afterwards obtained against him, and having obtained his certificate, brought a writ of error on the judgment, which non-prossed; held, that his certificate discharged him from the costs of the non-pros awarded against him. 3 M. & S. 326. — 14. A bankrupt's certificate does not discharge him from a debt due to the crown; for the statutes of bankrupts do not bind the crown. Bunb. 202. 1 Atk. 262. — 15. Where a plaintiff has the option of declaring, as for a sum certain, or for unliquidated damages; for example, for money had and received, or in trover; and elects the latter, the defendant's certificate is not a bar. 6 T.R. 695. — 16. Plea of certificate allowed, bill being considered as in lieu of assumpsit; by which, or by suit for a tort, plaintiff had a remedy. 3 Mad. 51. — 17. The certificate of a bankrupt discharges him from all debts, whether joint or separate; because, by the act of parliament, the bankrupt, upon making a full discovery and obtaining his certificate, is to be discharged of all his debts; and the debts he owes jointly with another are equally his debts, as what he owes on his separate account. 3 P. Wms. 25. *Ibid.* 23. 1 Atk. 67. 2 Stra. 1157. Day, 431. Fitz, 281. — 18. A. gave

But by the st. 10 Ann. 15. the discharge of a bankrupt from his debt shall not be construed to release any other person, who was partner in trade, or jointly bound, or liable to the same debt with the bankrupt.

So, if the bankrupt does not plead his discharge, but suffers judgment against him for a debt before his bankruptcy, he shall not be aided by an *audita querela*, nor in equity. R. 2 Ver. 697.

So, if he be taken in execution during the time that his certificate is depending before the judges, he shall not be aided upon motion, without an *audita querela*. 2 Ver. 697.

gave to B. a warrant to confess judgment, then took the benefit of an insolvent act, then became bankrupt and obtained his certificate; B. entered up a general judgment, and sued out a *sci. fa.* No dividend had been made. The court refused to interfere. 3 B. & P. 185. — 19. Previous to the late statute a tenant was liable for the breach of an express covenant running with the land, notwithstanding his bankruptcy before it was broken. 4 T. R. 94. — 20. So bankruptcy was no plea in bar to *covenant* for rent accrued since the bankruptcy. 1 H. B. 433. — 21. But bankruptcy was a bar to debt for rent accrued since the bankruptcy. 1 H. B. 437, n. 8 East, 314. — 22. Nor did the bankruptcy of a tenant occupying under a simple agreement, discharge him from assumpsit for future arrears of rent. 8 East, 311. — 23. But now, by stat. 49 Geo. 3. c. 121. s. 19. where the bankrupt "shall be entitled to any lease, or agreement for a lease, and the assignees shall accept the same and the benefit therefrom, as part of the bankrupt's estate and effects, the bankrupt shall not be, or be deemed to be, liable to pay the rent accruing due after such acceptance of the same, as aforesaid, and after such acceptance the bankrupt shall not be liable to be in any manner sued in respect or by reason of any subsequent non-observance or non-performance of the conditions, covenants or agreements therein contained: provided, that in all such cases as aforesaid, it shall be lawful for the lessor, or person agreeing to make such lease, his heirs, executors, administrators or assigns, if the assignees shall decline, upon their being required so to do, to determine whether they will or will not so accept such lease or agreement for a lease, to apply by petition to the lord chancellor, lord keeper or lords commissioners of the great seal, praying that they may either so accept the same, or deliver up the lease or agreement for the lease, and the possession of the premises demised or intended to be demised; who shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and which shall be binding upon all parties." — 24. The certificate does not discharge a bankrupt assignee of a lease from a collateral covenant not running with the land. 4 Burr. 2439. — 25. Where a defendant was in execution at the suit of the plaintiff, and a commission of bankrupt issued against him, and he was declared a bankrupt, and soon after, in order to regain his liberty, he gave the plaintiff a bond and warrant of attorney to confess judgment for the old debt, and the defendant afterwards obtained his certificate under the commission; the certificate was held to be no bar to the plaintiff's recovering; for it was a new debt arising upon a new consideration, because the bond and warrant of attorney were given in order to procure the defendant's liberty, and the old debt was thereby extinguished. 1 T. R. 715. — 26. School-money, payable half-yearly, is not a debt until the expiration of the half-year; and if the parent become bankrupt before the quarter-day, though after the child is gone home for the holidays, the debt is not barred by a certificate. 5 Esp. 78. — 27. English certificate discharges Scotch debts. 1 Rose, 462. — 28. English certificate discharges debts contracted here by consignment from a resident in Demarara, plaintiff having notice of commission. 1 Buck. 57. — 29. It has not been decided whether a certificate under a commission in England will bar a debt contracted in the West Indies before the bankruptcy. But an opinion given by lord Talbot, as counsel, has been cited as an authority, that it would not be a bar to an action; as the laws of England made since Barbadoes and the other plantations were settled, did not extend to them, unless they were expressly named. Bea. Lex Mer. 543. Davis. Bk. Laws, 439. — 30. And it seems that the extent of the discharge as to the person and effects, will depend upon the law of the country where the certificate is obtained. 1 Atk. 255. — 31. As to demand of surety being barred by certificate previous to st. 49 Geo. 3. c. 121. see Dick. 487. — 32. A promise to pay a weekly sum for the support of an illegitimate child, is not barred by certificate, except as to the arrears due at the time of the bankruptcy. 1 Camp. 428.

So by the st. 5 Geo. 2. 30. if (s) the creditors be not paid 15s. in the pound, he shall afterwards be liable to the creditors, except as to his body, tools of his trade, household goods and furniture, and apparel of himself, wife, and children. (t)

(D 35.) And shall plead it generally. (u)

And by the st. 4 & 5 Ann. 17. if the bankrupt shall be afterwards (x) arrested (y) or impleaded, for a debt due before he became bankrupt, he shall be discharged on common bail, and may plead in general, that the cause of such action did accrue before he became bankrupt, and may give the act and special matter in evidence, and the plaintiff being nonsuit, or having a verdict or judgment against him, shall pay costs. — But this act expired 26th June 1716.

So

(s) 1. A deed of composition, embracing in its terms all the creditors, though all do not come in under it, will restrain the effect of a subsequent certificate. 1 M. & S. 182. — 2. If a trader in partnership compounds with a particular class of creditors, thus, with his joint, in exclusion of his separate creditors, it is not a composition which will afterwards restrain the benefit of his certificate as a bankrupt. 15 East, 619. — 3. Though a prior commission has been superseded by consent, a certificate under a second bankruptcy, does not protect future effects, unless the bankrupt pay fifteen shillings in the pound under the second commission. Dougl. 46. — 4. That a certificate under a second commission may operate as a bar, the estate must actually have produced fifteen shillings in the pound. 16 East, 225. 1 B. & P. 467.

(t) The right against bankrupt's future effects can only be enforced by action; not by seizure of assignees, under the second commission. 19 Ves. 291.

(u) Vide infra. (I.)

(x) 1. Assumpsit lies by creditor against bankrupt upon a new promise. 1 Atk. 355. 1 Atk. 67. Peake, 68. 2 H. B. 116. Cowp. 544. 1 Esp. 280. Dougl. 192. 1 T. R. 7. 4 Burr. 2482. 1 T. R. 559. — 2. A promise of payment made by a bankrupt to a creditor, before he has obtained his certificate, is sufficient to revive the debt. 2 Esp. 736. — 3. To bind a bankrupt by a new promise to pay subsequent to his bankruptcy, it must be a precise and positive promise, and not given in general terms, that he would pay every body 20s. in the pound. 5 Esp. 198. — 4. A general assertion, by a certificated bankrupt, that he will pay every one 20s. in the pound, is not sufficient to revive a debt. 5 Esp. 198. — 5. An admission of the debt is not sufficient. 1 Stark. 370. — 6. If a bankrupt pays interest upon a bond proveable under the commission, after having obtained his certificate, it will be an admission by him that the principal was then due, and he might be liable as on a new contract. Dougl. 182. — 7. Where a bankrupt, after having obtained his certificate, said, "the plaintiff shall be no loser; but that he would pay when he was able;" two judges, against one, held the promise conditional, and that the plaintiff must prove his ability. 2 H. B. 116. — 8. A bankrupt, after a commission of bankruptcy sued out, may, in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor a satisfaction for part, or the whole of his debt, by a new agreement. Cowp. 544. — 9. If a certificated bankrupt is sued for an old debt, contended to have been revived by a new promise, the court will discharge him upon common bail. 2 Burr. 736.

(y) 1. By stat. 5 Geo. 2. c. 30. s. 7. if any bankrupt after the allowance of his certificate, shall be arrested for any debt due before he became bankrupt, he shall be discharged upon common bail. — 2. By sect. 13. of the same act, if any bankrupt, after his certificate shall have been allowed and confirmed according to the directions of the act, shall be taken in execution, or detained in prison on account of any debt due or owing before he became bankrupt, by reason that judgment was obtained before his certificate was allowed and confirmed, it shall be lawful for any one or more of the judges of the court wherein judgment has been so obtained, on the bankrupt's producing his certificate, allowed and confirmed, to order any sheriff, &c. who hath the bankrupt in custody by virtue of any such execution, to discharge him out of custody on such execution, without payment of any fee or reward. 2 H. Blac. 1. 2 Bos. & Pull. 390. — 3. If a bankrupt obtained his certificate pending an action to which he had given bail, formerly the method was, for the bail to surrender the defendant, and then for him to apply to

So by the st. 3 Geo. 12. this extends to bankrupts against whom a commission issued on or before 26th June 1716, who had discovered their effects, &c. or should do so before 25th December next ensuing. So by the st. 5 Geo. 24. for seven years longer.—And by the st. 5 Geo. 2. 30. for three years longer.

If there be a joint commission against A. and B. and the one be sued by a separate creditor, he shall plead generally, &c.; for after distribution of the joint stock to the joint creditors, the share of each out of the residue shall be to the separate creditors. Semb. F, g. 283.

But a bankrupt cannot plead the general issue.

So it is not sufficient to say, that he became bankrupt, and the cause of action accrued before, without saying, *quod vigore statuti* he pleads this; for the statute does not enable him to plead the general issue, but to plead generally, that the cause of action accrued before the bankruptcy; and therefore he ought to shew, that he pleads this by force of the statute. R. in C. B. Pas. 10 Ann. inter Fyson and (Reported Comyns's Rep. 205.)

So he shall not be discharged from a bond made before his bankruptcy, to pay to his wife, if she survive, 400*l.* in two months after his death; for it was not due before. R. inter Sparks and Tully in B. R. and afterwards in error, Trin. 3 Geo. 2. (Reported 2d Ld. Ray. 1546. 1570.)

So the bail of a bankrupt shall not be discharged. R. 2 Mod. Ca. 348.

be discharged, upon an affidavit, stating the fact of his having become a bankrupt since the cause of action arose, and obtained a certificate; but of late, where a bankrupt is clearly entitled to his discharge, the court, to avoid circuity, have ordered an *exoneretur* to be entered on the bail-piece, without the form of a regular surrender of the bankrupt by his bail. Cowp. 825. — 4. Where a bankrupt was surrendered in discharge of his bail after judgment, on account of a debt proveable under the commission, and his certificate was afterwards allowed, the court ordered him to be discharged. Barnes, 368. — 5. A certificated bankrupt, arrested on a *capias ullagatum*, by a creditor who has received dividends under the commission, must appear, and put in and perfect bail, before he can apply for relief. 14 East, 536. — 6. A second commission against an uncertificated bankrupt is void; and therefore a certificate obtained under it, will not entitle the bankrupt to be discharged under the stat. 5 Geo. 2.; and upon a motion made by a bankrupt's bail to enter an *exoneretur* on the bail-piece, the court refused the motion; for the bail can never be in a better situation than the principal. Cowp. 823. — 7. Where a debt was contracted abroad to a person residing here, and the debtor obtained his certificate abroad, the court would not decide the effect of it upon motion. 8 T. R. 609. — 8. A motion to discharge a defendant out of custody, on the ground of bankruptcy and certificate in Ireland, must be on affidavit of the effect of the certificate by the laws of Ireland. 1 Anst. 80. — 9. The court will not discharge a certificated bankrupt, for a demand accrued before the bankruptcy, where it appears that his certificate has been obtained by fraud. 2 H. B. 1. — 10. That the validity of the certificate is meant to be disputed, is an answer to an application to discharge a certificated bankrupt out of custody. 2 B. & P. 390. — 11. And where a debt was upon a bill of exchange, in which the bankrupt described himself as of a place where he had never lived, and the plaintiff never heard of the commission until after he had commenced his action, the court refused to discharge the bankrupt. 2 Black. 725. — 12. Where execution is taken out against the goods of a bankrupt before, and executed after allowance of certificate, the court will interpose in a summary way. 1 B. & P. 427. accord. 1 T. R. 361. contra.

(D 36.) Shall have a share of the neat produce.

So by the st. 4 & 5 Ann. 17. a bankrupt surrendering and conforming to the said act, shall have (z) 5*l.* per cent. paid him by the assignees out of the neat product of the estate received on such discovery, so as such sum amount not in the whole to above 200*l.* — So by the st. 5 Geo. 24. and 5 Geo. 2. 30.

And so as the creditors of the bankrupt be paid 8*s.* in the pound at least above all charges; for in such case he shall be allowed only what the assignees, or the major part of the commissioners, think fit.

And though this statute expired 26th June 1716, by the st. 3 Geo. 12. it was extended to all bankrupts against whom a commission issued on or before 26th June 1716, who shall discover effects, &c. before 25th December then next.

By the st. 5 Geo. 2. 30. if the creditors are not paid 10*s.* in the pound, the bankrupt shall be allowed only what the assignees and commissioners think fit, not exceeding 3*l.* per cent.

If paid 12*s.* 6*d.* in the pound, then 7*l.* 10*s.* per cent. so as it amount not to above 250*l.*; if paid 15*s.* in the pound, then 10*l.* per cent. so as it exceed not 300*l.*

(D 37.) But the bankrupt shall have no advantage; unless he has his certificate allowed.

But by the st. 4 & 5 Ann. 17. a bankrupt shall not have the benefit of that act, unless (a) a major part of the commissioners, by writing under

(z) 1. Unless a bankrupt obtains his certificate before a dividend is declared, he cannot sue his assignees for his allowance under stat. 5 Geo. 2. c. 30. s. 7. his estate having paid 10*s.* in the pound. 6 T. R. 548. — 2. Until a final dividend is made, a bankrupt is not entitled to his allowance. 1 Atk. 208. — 3. And even after a final dividend, unless a bankrupt has obtained his certificate previous thereto, he is not entitled to an allowance. — 4. If the bankrupt becomes entitled to his allowance, it is a vested interest in him, and transmissible to his representatives. 1 Atk. 208. Ibid. 209. — 5. It seems that creditors upon debts carrying interest, who have been paid their full debts, are not entitled to interest so as to diminish the bankrupt's allowance. 1 Ves. jun. 132. S. C. 5 Bro. 79. 1 Atk. 75. — 6. A bankrupt cannot sue his assignees for his allowance, after they have distributed all the effects. 1 Esp. 396. — 7. A bankrupt is entitled to a maintenance out of his effects, in those cases only where it is given to him by statute; not therefore during the period of his examination. 1 T. R. 157. — 8. Upon a second bankruptcy, no allowance to the bankrupt; the estate not paying 15*s.* in the pound. 6 Ves. 258. — 9. Order, as of course, that allowance under the first commission, shall be paid to assignees under the second. Cox, 213.

(a) 1. If a trader in Ireland becomes a bankrupt, and obtains his certificate, it will operate as a discharge in an action brought here upon a debt arising in Ireland; and Lord Mansfield said, "It is a general principle, that where there is a discharge by the law of one country, it will be a discharge in another. That he remembered a case in chancery of a *cessio bonorum* in Holland, which is held a discharge in that country, and it had the same effect here." Co. Bt. Laws, 499. — 2. Assumpsit against the drawer of a bill of exchange, drawn in America on a merchant in London, protested for non-acceptance; plea of bankruptcy, certificate and discharge thereby, in America. Held, that the parties being resident in America at the making of the bill, this is a good discharge here, if it is so in America, for the contract declared upon arises solely in America. The engagement of the drawer is, that he will pay in America, if the bill is not accepted in London. 1 Smith, 351. 5 East, 124. — 3. A certificate in Ireland, or a foreign country, will not discharge a debt contracted here. 2 H. B. 553. 1 East, 6.

their

their hands and seals, certify (*b*) the lord chancellor, that the bankrupt hath made full discovery of his effects, and in all things conformed to the directions of the act, and that they see no reason to doubt the truth of it; and unless such certificate be confirmed by the lord chancellor, or two judges to whom he shall refer it, before whom the creditors may be heard against the making or confirmation of the certificate.

Nor by the st. 5 Ann. 22. unless the allowance to the bankrupt and the certificate be signed by four parts in five in number and value of the creditors, who have proved their debts. — So by the st. 5 Geo. 24. and 5 Geo. 2. 30. of creditors for 20*l.* (*c*)

And

(*b*) 1. Commissioners discretion in relation to the certificate will not be controlled. 1 Atk. 82. 11 Ves. 417. 15 Ves. 181. 15 Ves. 126. — 2. The chancellor has no power to compel them to sign it. 11 Ves. 117. 15 Ves. 182. 15 Ves. 126. 7 East, 92. — 3. Nor will a *mandamus* lie to them to sign it. 7 East, 91. 5 Smith, 115. 11 Ves. 425. — 4. If, however, there has been no wilful concealment, they are in conscience bound to sign, without regard to conduct under the commission. 18 Ves. 342. 1 V. & B. 45. — 5. On the certificate being sent back to let in other creditors, commissioners are not bound by original certificate, but may exercise anew their judicial discretion. 15 Ves. 126.

(*c*) 1. By stat. 5 Geo. 2. c. 50. s. 10. the commissioners must, in writing under their hands and seals, certify to the lord chancellor, that the bankrupt has made a full discovery of his estate and effects, and in all things conformed himself according to the directions of the statutes relating to bankrupts, and that there does not appear to them to be any reason to doubt in the truth of such discovery, or that the same is not a full discovery of all such bankrupt's estate and effects; and the commissioners are also to certify that four parts in five in number and value of the creditors, who shall be creditors for not less than 20*l.* respectively, have signed and consented to the certificate. But the commissioners are not to certify the same, till they have proof by affidavit or affirmation in writing, of such creditors, or of the persons respectively authorized by them for that purpose, having signed the certificate; and of the power and authority by which any person is authorized by any creditor to sign the certificate. — 2. By the 5 Geo. 2. c. 50. s. 10. it is directed that four-fifths in number and value of the creditors of the bankrupt, for not less than 20*l.* respectively, and who shall have duly proved their debts under the commission, or some other person by them duly authorized, shall sign the certificate. But by stat. 49 Geo. 5. c. 121. s. 18. it is enacted, that "in all cases of commissions of bankrupt heretofore issued, and in which the bankrupts have not obtained their certificates, and in all cases in which commissions of bankrupt shall hereafter be sued forth, the signature and consent of three parts in five in number and value of the creditors of the bankrupt or bankrupts who shall be creditors for not less than 20*l.* respectively, and who shall have duly proved their debts under the commission, or some other person by them duly authorized thereto, to the allowance, and certificate, and discharge of the bankrupt or bankrupts, shall be, to all intents and purposes, as available for the benefit of the bankrupt or bankrupts as before the passing of this act, the signature and consent of four parts in five in number and value of such persons would have been available; and such signature and consent of three parts in five in number and value of such persons, shall be sufficient to authorize all acts to be done by the lord chancellor, lord keeper, and lords commissioners of the great seal, and the commissioners in such commissions of bankrupt, and all others, for the benefit of the bankrupt or bankrupts, which under any prior act or acts of parliament would have been authorized by the signature and consent of four parts in five in number and value of such persons." — 3. Proof as petitioning creditor, is not sufficient to entitle the party to sign the certificate. Cox, 398. — 4. See the general order of the 8th August 1809, as to the form of a creditor's signature to a certificate. — 5. One partner may sign for the firm, even after dissolution of the partnership. 1 Rose, 2. 17 Ves. 62. — 6. One trustee cannot sign for all. 2 Rose, 224. — 7. Where any creditor or creditors of a bankrupt reside in foreign parts, the letter of attorney of such creditor, attested by a notary public in the usual form, is sufficient evidence of the power and authority by which any person thereby authorized shall sign any bankrupt's certificate. 24 Geo. 2. c. 57. s. 10. — 8. A creditor, being the executor of a creditor, can sign but once. 1 Rose, 66. 1 Atk. 34. — 9. If a bankrupt becomes the

executor of a creditor who was entitled to sign the certificate, he may in that capacity sign his own certificate. Green, 260.—9. Signature by creditor of certificate, is absolutely in his discretion. 5 V. & B. 107. Dougl. 216.—10. The certificate cannot be signed before the passing of the last examination. 1 Rose, 176; vide 11 Ves. 424.—11. It is very doubtful, whether a signature previous to the last examination, is such as the act of parliament intended. Per J. d. Eldon, in 11 Ves. 424.—12. Of certifying to commissioners the period of signature. General order of 8th August 1809. 16 Ves. 518. 1 Rose, 5.—13. The signature and sealing of the certificate by the commissioners, is to be attested in writing upon such certificate by the solicitor to the commission, or some clerk of the solicitor, or by the messenger to the commission, or by some clerk of the commissioners respectively; and in order to avoid frauds upon the commissioners, with respect to the certificate, a list is to be made and kept by the commissioners, or one of them, of all creditors above 20*l.* who shall from time to time prove their debts, and of the amount of their respective debts, which list is from time to time to be made up and signed by three of the commissioners. General order, 8th August 1809.—14. Bankrupt must make oath that the certificate and consent of the creditors were fairly obtained. Stat. 5 G. 2. c. 50. s. 10.—15. Signing the certificate does not release the estate of the bankrupt's deceased partner. 1 Mer. 570.—16. Inconsistency of statement appearing upon bankrupt's examination, is a ground for staying the certificate. 17 Ves. 117.—17. Certificate obtained by money, though without the bankrupt's privity, will be stayed. 10 Ves. 559.—18. Where the assignees were the bankrupt's near relations, and the certificate was signed within three months after the issuing of the commission; upon petition by a creditor to prove his debt, to stay the bankrupt's certificate, and for liberty to assent or dissent thereto; the certificate was stayed. 1 Atk. 84.—19. Where a bankrupt was a trader in Ireland, and his certificate was signed in less than three months after the commission issued, and it appeared upon his examination, that the greatest part of his books were then in Ireland; and it might be presumed, that there were large debts standing out against him there, the lord chancellor stayed the allowance of the certificate, to give such creditors an opportunity of proving their debts, and opposing the certificate. 1 Atk. 82. But after a full time has been allowed for inquiry, and for creditors coming from Ireland or sending affidavits over, the certificate will be allowed. For "I cannot lock up certificates for ever, and deprive a man of his liberty, which the law has given him." Per Lord Hardwicke.—20. If the nature of the case appears to require, that the allowance of the certificate should be suspended, the lord chancellor will postpone the allowance. As where a certificate was signed on the very day the bankrupt finished his last examination, and within six weeks from the time of issuing the commission; and the principal creditors lived at Guernsey, and had not been able to inquire into the bankrupt's conduct, or to prove their debts. 1 Atk. 84.—21. Certificate stayed, that creditor, whose debt would turn it, might assent or dissent. 2 Rose, 421.—22. If after a certificate has been signed by creditors sufficient in number and value, and the signature and consent have been certified by the commissioners, new creditors prove their debts; they will not be entitled to stay the allowance of the certificate, unless upon petition they can shew that such certificate was fraudulently obtained. 1 Atk. 75.—23. Certificate will not be stayed upon the mere suspicion that it was obtained by money, unsupported by affidavit, and denied by bankrupt. 17 Ves. 62.—24. Certificate will not be stayed upon the charge of gaming, where the affidavits are in direct opposition. 1 V. & B. 195.—25. Certificate will be stayed upon the ground of concealment of property positively established. *Secus*, upon petition founded upon information and belief. 1 Rose, 184. 18 Ves. 540.—26. Certificate will be stayed upon the ground of admission, by bankrupt, of fictitious proof. 1 Rose, 330. 2 Rose, 71. 5 V. & B. 142.—27. But certificate will not be stayed upon the ground of permission by assignees to the bankrupt's continuing trade as before. 1 Rose, 93.—28. Certificate will not be stayed upon the ground of bankrupt having retained money as assignee under another commission. 1 Rose, 95.—29. Certificate will not be stayed upon the ground of alteration therein vitiating the stamp. 1 Rose, 141.—30. Certificate will not be stayed upon a formal objection to a proof. 1 Rose, 66.—31. Certificate will not be stayed upon a legal objection, unless it clearly appear. 1 Rose, 331.—32. Certificate will not be stayed, that one claiming a right to stop *in transitu*, might, if his action failed, prove. 6 Ves. 615.—33. Certificate will not be stayed upon the ground that petition to supersede it is pending. 2 Rose, 61.—34. Certificate will not be stayed upon the ground that question of sequestration against bankrupt is pending in Scotland. 2 Rose, 253.—35. Certificate under separate commission will not be stayed upon the ground that joint commission is sued out. 1 V. & B. 308.—36. Certificate will not be stayed from neglect of commissioners to certify a former bankruptcy.

And a bond or agreement by the bankrupt, or any other, &c. to induce a creditor to consent to such allowance or certificate, shall be void. — So by the st. 5 Geo. 2.4. and 5 Geo. 2. 30. (d)

The certificate of the commissioners ought regularly to mention, that the party became bankrupt since the st. 4 & 5 Ann. 17. commenced, viz. since the 24th June 1706. 1 Sal. 111.

And if the certificate be silent, and proof is made that he was a bankrupt before, the certificate shall be disallowed. R. 1 Sal. 111. (e)

If the chancellor refers the certificate to the judges, they may examine witnesses upon it *viva voce*. R. 1 Sal. 112.

And make out summons for the witnesses. R. 1 Sal. 112.

And they ought to examine the witnesses *viva voce*, if there are such. 1 Sal. 112.

If there are not, they may inform themselves by affidavits filed in chancery, and sworn before a master extraordinary. 1 Sal. 112.

Or by affidavits before themselves. 1 Sal. 112. (f)

(D 38.) If

bankruptcy. 1 Rose, 60. — 37. Certificate will not be stayed from the bankrupt being uncertificated under a former commission. 1 Rose, 285. — 38. Keeping a lottery office is no ground for opposing the certificate. Nor is the obtaining of goods under false pretences. Co. Bt. Laws, 463. — 39. If a certificate is signed by a creditor who is not entitled to prove, the certificate will be sent back. As where a creditor who proved upon a judgment to indemnify, but was not dammified, and signed the certificate; it was held that he was not entitled, and the certificate was sent back. Co. Bt. Laws, 462. — 40. *Quære*, Whether the certificate can be sent back, upon the point, whether a full discovery has been made. 17 Ves. 117. — 41. After the certificate is signed by the commissioners, it must be allowed and confirmed by the lord chancellor, lord keeper, or commissioners for the custody of the great seal for the time being; or by two of the justices of the courts of king's bench, common pleas, or barons of the exchequer, to whom it shall be referred by the great seal. When the certificate is laid before the great seal for allowance, the affidavit or affirmation of the creditor signing, together with any warrant or authority to sign, must also be laid before it; and before its allowance the bankrupt must make oath, or being a quaker, affirm in writing, that the certificate and consent of the creditors were obtained fairly and without fraud. 5 Geo. 2. c. 30. s. 10. — 42. The bankrupt's certificate, until allowed, operates nothing. 2 Blk. 811. — 43. All certificates formerly were referred to the judges, but the great seal finding it inconvenient, has taken the cognizance of it. — 44. Allowance of a joint certificate as a separate one, upon the death of one partner. 10 Ves. 51. — 45. If all the requisites have been complied with, previous to laying a certificate before the lord chancellor for his allowance, it may be allowed by the lord chancellor after the death of the bankrupt. 1 Atk. 77. — 46. Certificate obtained by fraud will be revoked. 2 Rose, 186. 19 Ves. 260. — 47. Certificate obtained by imposition practised upon great seal, will be recalled, if third persons, subsequently dealing upon faith thereof, will not be prejudiced; to ascertain which, inquiry was directed. 1 B. & B. 321. — 48. When the commissioners have signed the certificate, notice must be given in the London Gazette, that the same will be allowed by the lord chancellor, unless cause is shewn to the contrary on or before a particular day, which is always twenty-one days from the notice in the Gazette. Cooke, 463.

(d) Vide infra (N).

(e) A certificate under a second commission against an uncertificated bankrupt, seems to be a nullity. 1 Atk. 251.

(f) 1. The bankrupt is not compellable to execute a power. 1 Rose, 40. 17 Ves. 388. 1 Rose, 270. 17 Ves. 460. — 2. The bankrupt is not compellable to execute an assignment of debts abroad. Cox, 398. — 3. The bankrupt is not compellable to join in conveying. Cooper, 134. — 4. The bankrupt is compellable, though after the last examination, to deliver papers and to give his attendance before commissioners. 1 Rose, 202. — 5. A bankrupt, after his surrender, is required to attend the assignees upon every reasonable notice in writing for that purpose given by such assignees, or left for him at his house or place of abode, in order to assist such assignees in making

(D 38.) If he have given extravagant portions to his children, or lost at play.

So by the st. 4 & 5 Ann. 17. a bankrupt shall not have benefit of the act, who hath on the marriage of any of his children given above 100% ; unless he make it appear he was worth, above the sum so given, sufficient to satisfy all his creditors their full debts. So by the st. 5 Geo. 24.

Or who hath lost 5*l.* in one day, or 100% in the whole, in 12 months preceeding his bankruptcy, in play at cards, dice, tables, tennis, bowls, shovel-board, cock-fighting, racing, dog-matches, or other past-times or games, or in bearing part of stakes, or betting on the side of such as did play,—So by the st. 5 Geo. 24. (J)

When

out the accounts of his estate and effects, and is to be at liberty to inspect his books, papers, and writings, in the presence of his assignees, and to take copies or extracts therefrom during the 42 days, or the enlarged time for finishing his examination. Stat. 5 Geo. 2. c. 50. s. 4. 5. — 6. Where the assignee of a bankrupt gave notice to the bankrupt to attend him, in order to explain several matters relating to his estate, after the 42 days expired, and before the certificate was signed, and the bankrupt refused to attend upon any other terms than signing his certificate; Lord Hardwicke said, he would compel him to attend, if the assignees would undertake that he should not be arrested by any of the creditors who sought relief under the commission. 1 Atk. 148. — 7. Bankrupt to attend the assignees after obtaining his certificate, and be allowed 2*s.* 6*d.* a day during such attendance. Stat. 5 Geo. 2. c. 50. s. 56. — 8. Bankrupt to deliver up his books upon oath. Stat. 5 Geo. 2. c. 50. s. 1. 1.

(f) 1. By stat. 5 Geo. 2. c. 50. if the bankrupt's certificate has been obtained unfairly and by fraud, or if any concealment has been made by the bankrupt to the value of ten pounds, the certificate will be of no avail. — 2. Or if within one year before he became bankrupt, he has lost the sum of 100*l.* by one or more contracts for the purchase, sale, refusal, or delivery of any stock of any company or corporation, or any parts or shares of any government or public funds or securities, where every such contract was not to be performed within one week from the time of the making such contract, or where the stock or other thing so bought or sold, was not actually transferred or delivered in pursuance of such contract. — 3. By stat. 24 Geo. 3. c. 57. s. 9. if any persons shall fraudulently swear or depose, or being of the people called quakers affirm, before the major part of the commissioners named in any commission of bankruptcy, or by affidavit or affirmation exhibited to them, that a sum of money is due to him or her from any bankrupt or bankrupts, which shall in fact not be really and truly so due or owing; and shall, in respect of such fictitious and pretended debts, sign his or her consent to the certificate for such bankrupt's discharge from his debts; in every such case, unless such bankrupt shall, before such time as the major part of the said commissioners shall have signed such certificate, by writing by him to be signed and delivered to one or more of the said commissioners, or to one or more of the assignees of his estate and effects under such commissioners, disclose the said fraud, and object to the reality of such debt, such certificate shall be null and void to all intents and purposes, and such bankrupt shall not in that case be entitled to be discharged from his debts, or to have or receive any of the benefits or allowances given or allowed to bankrupts. — 4. A signature obtained for money, though without the bankrupt's privity, avoids the certificate. 1 B. & P. 95. — 5. If some of the bankrupt's creditors are induced by money to sign the certificate, though the bankrupt does not know of it at the time of their signing, nor even when he makes the necessary affidavit, in order to obtain its allowance; yet if he knows it before actual allowance, the certificate is void. Dougl. 228. — 6. Where any one creditor receives a collateral consideration for signing the certificate, the certificate is void, if the signatures preceeding his own are not sufficient to carry the certificate. 15 East, 248. — 7. If money is given without the bankrupt's privity, to induce creditors to sign, in order to deprive him of the effect of his certificate, and sufficient in number and value have signed, exclusive of those who have taken money, the certificate is valid. Dougl. 250. — 8. Where a bankrupt had given 1000*l.* to his niece upon her marriage, Lord Hardwicke held, that the clause in the act being penal, it ought to be construed strictly,

When a bankrupt shall be aided in equity, and when not, vide in Chancery, (2 L 1, 2.)

(D 39.) How a commissioner, &c. may plead.

By the st. 1 Jac. 15. in trespass or other suit against a commissioner, or other having authority by a commission of bankruptcy, he may plead, not guilty, or justify that he acted by authority of the acts against bankrupts, without shewing the commission or other circumstance; to which the plaintiff may reply, *de son tort*, &c. and the special matter may be given in evidence.

So by the st. 4 & 5 Ann. 17. any person sued by action, information, &c. for any thing done in prosecution of the said act, may plead the general issue, and give the special matter in evidence.

(D 40.) Expences of the commission.

By the st. 4 & 5 Ann. 17. no monies shall be paid or allowed out of the estate of the bankrupt (g) for expences of eating or drinking of the commissioners, or any others, at any of their meetings, &c. — So by the st. 5 Geo. 24.

And by the st. 5 Geo. 24. no commissioners shall take above 20s. for any meeting, or for executing any deed, or above 10s. for any warrant of seizure or distribution. (h)

(D 41.) When

and confined to the children of a bankrupt. 1 Atk. 86. — 9. Insuring in the lottery is not such a gaming as to invalidate the certificate. 1 H. B. 29. — 10. If upon the plea of bankruptcy and certificate, any thing is alleged which may induce the court to suppose the certificate to be invalid, the court will direct an issue. Dougl. 216. 2 Bos. & Pull. 427. — 11. Where assignees brought an action against the plaintiff, on account of some transactions with the bankrupt, and the plaintiff filed his bill for a discovery, whether the creditors had not signed the bankrupt's certificate, upon his agreeing to give evidence for them upon the action; and the defendants demurred; the court allowed the demurrer, and said, "if you mean to impute subornation of perjury, you cannot expect an answer; if, on the other hand, what is charged was merely a mode of getting over a technical objection to evidence, by removing the interest of the bankrupt, the signing his certificate, and getting a release from him, is a common and by no means an improper transaction; in which case the discovery is immaterial." 2 Anst. 504. — 12. Effect of the certificate in favour of third persons, though avoided, see 4 Ves. 40. n. — 13. Evidence may be given to defeat the certificate, though it may indirectly have the effect of impeaching the commission. 4 Esp. 43. — 14. Where a certificate was signed in consequence of money given to a creditor by a friend of the bankrupt, but without his consent or knowledge, the lord chancellor, upon the application and affidavit of the bankrupt, ordered the certificate to be cancelled, that he might procure a new certificate sufficiently signed, without the signature of the creditor who had received the money. 4 Mon. Bt. Laws, App. 56.; and see 1 Bos. & Pull. 95.

(g) 1. Bankrupt is chargeable with costs in case of fraud and misconduct. 3 V. & B. 40. — 2. Bankrupt is chargeable with costs upon presenting a third petition, after two similar ones dismissed. 2 Ves. 40. But order restraining the presenting of any more, refused. Ibid.

(h) 1. The general rule is, that the petitioning creditor, not the solicitor he employs, is liable to the messenger. 2 M. & S. 438. — 2. He too is solely liable. 1 Stark. 378. — 3. An exception to this rule occurs where the solicitor agrees to work the commission for a gross sum; when having received sufficient to cover the messenger's demand he is liable to him as for money had and received. 2 M. & S. 439. — 4. Assignees give directions to the attorney originally employed, to sue out the commission, pointing out the steps he is to take in the business. They are personally

(D 41.) When the commission may be superseded.

If the commission of bankruptcy takes effect, and all the creditors who appear have a satisfaction, the chancellor by their assent may supersede (i) it. 2 Ca. Ch. 144. Dub. Sh. 200.

liable for his bill, as upon an original retainer. 1 Stark. 278. — 5. The provisions of 5 Geo. 2. c. 30, 31, 45. apply only to the allowance to be made out of the bankrupt's estates, and do not affect the common law liability of the assignees. Holt, 378. — 6. Costs subsequent to the choice of assignees, to be taxed by a master. St. 5 Geo. 2. c. 30. s. 45. — 7. Chancellor may order allowances, made by commissioners for expences of commission, to be taxed by a master. Cooke, 11. — 8. Where the assignees continue the attorney employed by the petitioning creditor, the attorney is bound to apply money, received from the assignees, in liquidation, in the first instance, of his claims against the petitioning creditor. 15 East, 248. — 9. Of adjusting the equitable rights between the attorney to the commission and the bankrupt. See 1 Buck. 24. 37. — 10. The attorney is responsible for commissioners' fees. 2 Rose, 542. 1 Mad. 56. — 11. The joint fund is not chargeable with the expences of the attorney, incurred by conducting examinations, &c. before commissioners, for joint creditors under a separate commission. 1 Rose, 505. — 12. A solicitor may sue an assignee for business done under the commission, although his bill has not been taxed by a master under stat. 5 Geo. 2. c. 50. s. 45. 1 Stark. 278.

(i) 1. A commission supersedeable and one superseded, distinguished. 1 V. & B. 41. — 2. The vice-chancellor has jurisdiction to grant a *supersedeas*. 2 Rose, 162. 235, n. — 3. With one exception, a *supersedeas* is discretionary; namely, in the case provided for by stat. 5 Geo. 3. c. 50. s. 24. 1 Rose, 380. 1 V. & B. 40. 19 Ves. 291. — 4. The validity, of a commission, at law, is not the criterion of *supersedeas*. 1 V. & B. 54. — 5. A commission may be supported on an act of bankruptcy, intelligence of which could not have reached London on the day the commission issued. Stark. 507. — 6. *Supersedeas*, from the probability that the party is not within the bankrupt laws, refused, in the case of a scrivener. 2 Rose, 59. — 7. Commission is not avoided by a prior act of bankruptcy, previous to petitioning creditor's debt, if he had not notice when the debt was contracted. Stat. 46 Geo. 3. c. 135. s. 5. — 8. Nor even then without proof that a petitioning creditor's debt then existed. 1 Taunt. 71. — 9. And with respect to the bankrupt, he cannot impeach it even then. 2 Rose, 8. 15 Ves. 6. 468. — 10. *Supersedeas*, from the act of bankruptcy not sufficiently appearing, and from a farther affidavit ordered, not being satisfactory. 1 Rose, 49. — 11. *Supersedeas*, from describing a *feme covert*, sole trader, as a widow, refused. 1 Atk. 206. — 12. *Supersedeas* will be granted if there is not a good petitioning creditor's debt. 1 Atk. 146. 1 Str. 653. 2 Str. 899. 1 P. Wms. 259. Mosely, 37. Vide 1 Rose, 141. — 13. *Supersedeas*, from not inserting barristers in country commissions. 1 Rose, 58. — 14. *Supersedeas*, as being the commission of the bankrupt, even though the act of bankruptcy was not concerted. 1 Rose, 599. — 15. *Supersedeas*, as having been issued at his instigation, refused. 1 Buck, 249. — 16. Formerly, fraud to warrant a *supersedeas*, was presumed from a delay of six months. 1 V. & B. 41. — 17. But it is not presumable from debts being proved by relations. 1 V. & B. 45. — 18. *Supersedeas*, as concerted, even though carried on *bona fide*. 1 Rose, 87. — 19. And even though it be for the benefit of creditors. 1 Buck, 257. — 20. *Supersedeas* as concerted will be with costs. 1 Mad. 250. — 21. Of solicitor and petitioning creditor. 1 Buck, 77. — 22. Suspicion that commission is concerted, is not a sufficient ground for a *supersedeas*. 16 Ves. 161. — 23. Those who are privy to a concerted act of bankruptcy, cannot take advantage of it; those, therefore, who are privy to a deed, whereby a trader assigns all his effects. 2 T. R. 594, n. (a). Ibid, 595, (b). — 24. *Secus*, those not privy. 16 Ves. 145. — 25. *Supersedeas*, as issued to work a dissolution of partnership. 1 Rose, 151. — 26. *Supersedeas*, as issued to force a compromise. 2 Rose, 203. — 27. *Supersedeas*, as issued to determine a lease. 2 Rose, 484. — 28. *Supersedeas*, as issued to defeat an execution, will be refused. 14 Ves. 209. 11 Ves. 541. 1 V. & B. 45. 1 B. & P. 369. — 29. *Supersedeas* to protect the bankrupt from prosecution, will be granted where the neglecting to surrender has been through ignorance, accident, or mistake. 1 Atk. 222. 1 Rose, 55. 18 Ves. 18. — 30. A commission taken out fraudulently or vexatiously is supersedeable. 1 Atk. 218. 13 Ves. 62. 67. 14 Ves. 209. — 31. And, at all events, it will not, where oppressive, be aided, but

but its validity will be strictly scrutinized. 1 Rose, 147. — 32. *Supersedeas*, from the act of bankruptcy being stale and notorious, the creditor interested, and the debt disputed. 4 Ves. 168. — 33. *Supersedeas*, upon the ground that part of the property will cover all demands. 1 V. & B. 211. — 34. *Supersedeas*, from commission being too distant from creditors, refused. 2 Mad. 141. — 35. *Supersedeas*, upon consent of petitioning creditor. 1 V. & B. 348. — 36. The bankrupt's paying, satisfying, or securing petitioning creditor's debt, whereby he has privately more in the pound for it, than other creditors have for their debts, renders the commission supersedeable. Stat. 5 Geo. 2. c. 30. s. 24. — 37. But *supersedeas* upon this ground will not be granted to the bankrupt. 15 Ves. 464.; but see 1 Mont. 65. — 38. *Supersedeas*, without leave, by the creditor, upon receiving his debt, improper; and he will be ordered to refund. 1 Ves. jun. 157. — 39. Commission is supersedeable at any time after the first meeting, upon consent of all who have proved. 16 Ves. 416. — 40. Order relative to *supersedeas*, with consent. 21st Aug. 1818. 3 Mad. 392. 1 Buck. 281. — 41. To an amicable *supersedeas*, consent of all is requisite. Vide 2 Ves. 40. 8 Ves. 533. 19 Ves. 204. — 42. And *supersedeas* upon certificate of those who have proved will be stayed, that one who requested them not to certify may prove. 1 Atk. 134. — 43. A commission upon a trading during coverture will be superseded. 2 Bro. 265. — 44. So upon a trading during infancy. 14 Ves. 603. 1 Atk. 146. — 45. *Supersedeas* from infancy refused, under circumstances. 16 Ves. 265. — 46. A commission invalid may be supported upon any other act. 1 Buck. 233. — 47. Thus, a commission invalid from the act being concerted. 7 Ves. 303. 16 Ves. 148. 1 V. & B. 52. — 48. Though subsequent to the affidavit of belief. 1 V. & B. 56. — 49. General order of 26th Jan. 1793, respecting *supersedeas* from delay. 2 Ves. 190. Supra, Div. 13. 2 P. Wms. 545. 2 Rose, 451. — 50. Construction of the order. Cooper, 227. — 51. Upon *supersedeas* for this cause, the bond will not be assigned. 1 Rose, 454. — 52. *Supersedeas* after acquiescence, if considerable, will be refused, without a trial at law. 15 Ves. 464. — 53. *Supersedeas*, even after certificate, will be granted, but only for fraud, unless the invalidity is apparent upon the proceedings. 1 Buck, 75 Cox, 227. — 54. *Supersedeas* upon an objection to the trading, and that debtors upon that ground refused to pay, refused. 2 Rose, 324. — 55. And it will be refused upon a stale application. 14 Ves. 602. 1 Buck, 68. — 56. A commission, otherwise supersedeable, upheld in favour of purchasers. 10 Ves. 104. — 57. Bankrupt in a situation to try, will be left to his action, and conditioned as to the time of trial. 1 Buck, 220. — 58. Strictly, a second commission against an uncertificated bankrupt is void. 15 Ves. 114. 1 V. & B. 60. 3 V. & B. 99. 15 Ves. 539. Cowp. 823. Cooke, 9. — 59. But for this the first must be a commission in legal operation. 1 Rose, 134. — 60. It is, however, in this, as in all other cases, discretionary with the chancellor to supersede it or not. 16 Ves. 472. 15 Ves. 539. — 61. And the rule is, to support that commission which will do the most justice, and supersede the other. 1 V. & B. 163. 3 V. & B. 97. — 62. *Supersedeas* of a commission against an uncertificated bankrupt, refused with costs, he having long been permitted to trade. 16 Ves. 16. — 63. So, likewise, where the creditors under the first had signed the certificate, and long acquiesced under the second. 1 Atk. 252. — 64. Where a commission is sued against an uncertificated bankrupt, who had long been permitted to trade, if the assignees under the second, offer to pay the creditors under the first, 20s. in the pound, and all the costs, the first will instantly be suspended. 2 Ves. 67. — 65. A separate commission never opened does not invalidate a subsequent joint one. 2 Rose, 432. — 66. And in practice, joint commissions are taken out after the parties have been declared bankrupts under separate commissions. Cooke, 9. — 67. A third commission is valid, notwithstanding the second has not paid 15s. in the pound. 2 Rose, 172. — 68. A separate, though prior, will be superseded in favour of a joint commission, unless there is a sufficient reason to the contrary. 2 Rose, 26. Cox, 397. 1 V. & B. 163. 16 Ves. 236. — 69. That a separate creditor to a great amount will thereby be prevented voting in the choice of assignees, is not a sufficient reason against it. 2 Rose, 26. — 70. But length of time, and certificate obtained under a separate commission, is. 1 Rose, 89. 17 Ves. 403. — 71. As is likewise the circumstance of the bankrupt's having committed felony by not surrendering under a separate commission. 2 Rose, 378. — 72. *Supersedeas* of a separate in favour of a joint commission, will be refused, where the joint cannot be sustained. 1 Mad. 72. — 73. Upon superseding a separate in favour of a subsequent joint commission, taken out by joint and several creditors, the petitioning creditor under the former will have his costs, if acting *bona fide*; and all his rights as a joint and several creditor, to prove and elect between joint and separate estates, will be secured to him. 1 V. & B. 60. — 74. Joint commission superseded upon petition of assignees under separate commission, from infancy of one partner. Ves. 601. — 75. *Supersedeas* of a joint,
issued

issued pending a separate commission in Ireland, refused. 2 Rose, 164. 3 V. & B. 94. — 76. *Supersedeas* of a commission issued pending an analagous proceeding abroad, refused. 3 V. & B. 97. — 77. Sealing the commission is a preliminary to a *supersedeas*. 2 V. & B. 255. — 78. Adjudication of bankruptcy, a preliminary to a *supersedeas*. 1 Rose, 150. — 79. Surrender, a preliminary to a *supersedeas*. 8 Ves. 328. 11 Ves. 409. 17 Ves. 48. 1 Mad. 72. — 79. But dispensed with, under circumstances. 1 Rose, 228. — 80. Bankrupt may petition for a *supersedeas* whilst under commitment. 1 Rose, 60. 18 Ves. 289. accord. 17 Ves. 47. contra. — 81. The plaintiff in an action in which his attorney, the bankrupt, had been attached for not putting in bail pursuant to his undertaking, has a sufficient interest to petition for a *supersedeas*. Cox, 425. — 82. A creditor by proving is not incapacitated from petitioning for a *supersedeas*. 2 Rose, 61. — 83. One who has neither proved nor sworn to a debt in support of his petition, is. 2 Mad. 281. — 84. A creditor, privy to a composition with the petitioning creditor, may nevertheless petition upon that ground. 1 Buck, 19. — 85. Upon a *supersedeas* for an informality in relation to petitioning creditor's debt, with no doubt as to the bankruptcy, the costs of the *supersedeas* only will be allowed. *Secus*, had the bankruptcy not been so clear. 1 Atk. 100. — 86. Upon a bankruptcy, before hearing, the assignees must present a supplemental petition. 1 Buck, 99. — 87. A bankrupt presents a petition to supersede his commission, and then dies before the last meeting of the commissioners, without having surrendered himself. The petition is revived by his personal representative; the commission ordered to be superseded. 1 Buck, 235. — 88. Upon the bankrupt petitioning for a *supersedeas* upon an affidavit denying an act of bankruptcy; though there be no counter affidavit, or notice that proceedings would be produced, the court will inspect them, to see if there is an act. 1 Mad. 624. — 89. Petition to supersede a commission of bankruptcy, and stay the certificate, dismissed for want of proof of collusion; but, in a suspicious case, without costs. 1 V. & B. 45. — 90. *Supersedeas* upon a general denial of bankruptcy, refused; it should be specific to the facts charged. 1 Atk. 240. — 91. Petition for a *supersedeas* made before any meeting, upon affidavit denying the essentials of bankruptcy, refused; as likewise an issue. 7 Ves. 405. — 92. If it appear by the petition of a creditor to supersede a commission, that an action is commenced to try its validity, the court will not supersede the commission till the event of the trial is known. 1 Buck, 230. — 93. Where a bankrupt has, in an action against his assignees, established that there was no act of bankruptcy, the court will not, unless under very special circumstances, delay superseding the commission till after another trial. It is not a sufficient ground that the assignees have evidence to support the commission, which they were prevented from producing by surprise. 1 Rose, 51. — 94. If a commission is taken out upon an act proved, at the trial of an issue, to have been concerted with the petitioning creditor and the solicitor, the court will supersede it, and will not direct another issue to try the validity of the commission, with liberty to prove other acts. 1 Buck, 77. — 95. *Supersedeas*, with leave to sue out another commission, refused, where the commission had been kept unexecuted pending an arrangement for a composition; and petition was for leave to proceed, or to supersede, &c. 1 Rose, 332. — 96. Proceedings under a commission superseded, made available under another, in a case where two commissions had issued. 17 Ves. 212. — 97. An order for a *supersedeas* has no operation. 6 Ves. 434. — 98. The effect of a *supersedeas* is, that all falls with it 1 V. & B. 66. — 99. Hence it divests the estates from the assignees. 1 Buck, 262, n. — 100. A creditor, by proving, does not even *prima facie* admit the validity of the commission; much less does he estop himself disputing it. 16 East, 191. 1 N. R. 263. 1 Esp. 108. — 101. But the petitioning creditor is pledged to its validity, even where, when sued by the assignees, it is apparent that his debt is not of the requisite amount. 1 Moore, 300. — 102. And an assignee who has proved, and to whom it is, in equity, put to admit the commission or not, by disputing it sacrifices his proof. 1 Rose, 395. — 103. Acquiescence for seven years; ejectment by bankrupt, instigated by petitioning and another creditor, for premises sold under the commission, restrained. 1 Buck, 90. — 104. Although the requisites to sustain the commission appear on the proceedings to be established, yet if the court be satisfied, on affidavit of their insufficiency, it will supersede the commission without an issue. 2 Rose, 234. 235. — 105. Though the petitioning creditor desires an issue or an action. 1 Mad. 67. — 106. Hence, where the commission is plainly fraudulent or vexatious, it will, upon bankrupt's petition, be superseded instantly, or sent back to commissioners to consider if, upon the evidence, they can declare him a bankrupt. 1 Atk. 193.; otherwise it will be sent to an issue. 1 Atk. 217. — 107. Especially if the bankrupt is abroad. 1 Atk. 193. — 108. And where he had surrendered and acquiesced, for a year and a half; chancellor refusing an issue, left him to his action. 1 Atk. 102. — 109. Affidavits that merely state

hearsay

Though it be within four months, and there are other creditors who would afterwards appear. *Semb.* 2 Ca. Ch. 144. 191.

So, if the creditors who petition pray that it be superseded, it shall be superseded within the four months, though there are other creditors who afterwards pray a commission. *R.* 1 Ver. 208.

Though the creditors, who had petitioned, compound with the heir, the bankrupt himself being dead. 1 Ver. 209.

So the commission abates by the death of the king. 2 Ca. Ch. 192.

So, if all the commissioners die, except two, where the commission is to three or more, there shall be a new commission.

But if a supersedeas be granted by surprise, it may be discharged. *R.* 2 Ca. Cha. 144.

hearsay and belief as to a commission being concerted, are not alone sufficient to induce the court to direct an issue; but if they are corroborated by circumstances of suspicion attending the case, an issue will be directed. 1 Buck, 247. — 110. Issue directed, in preference to leaving the bankrupt to his action, when the commissioners have not had the circumstances of trading, &c. fully before them. The proceedings in the mean time suspended, upon the doubt as to the bankruptcy. 1 Rose, 573. — 111. A separate commission of bankrupt issued against A., who was one of three partners, under which he obtained his certificate. A joint commission afterwards issued against the three. On an application to supersede the separate commission, and an allegation that the certificate was not fairly obtained, the court will direct an inquiry into the circumstances under which the certificate was obtained. *Cox*, 195. — 112. Where the court directs an action to be brought to try the bankruptcy, it suspends, in the mean time, the proceedings under the commission; but if the action establishes the bankruptcy, it will not, without special ground, allow a longer suspension; nor is it a sufficient ground, that the bankrupt is about to bring another action, and therein to put his objection to the commission upon the record, in order to carry it, by writ of error, to the house of lords. 2 Rose, 1. — 113. Upon an order to proceed upon two issues to try the validity of the commission, the plaintiff to give notice in writing to the bankrupt of the acts intended to be relied on at the trial. Held, that the petitioner in his notice must specify the acts relied on, the times when they were committed, and the witnesses who will be called to prove them. 1 Buck, 137. — 114. Payment to creditors under the commission, a ground for staying it, if funds proposed are fully and immediately applicable. 2 Rose, 1. — 115. Separate commission impounded, sales having taken place. 1 Rose, 416. — 116. Commission not opened refused to be stayed upon the allegation of no petitioning creditor's debt. 17 Ves. 512. — 117. Proceedings in actions disputing its validity regulated. 2 Rose, 340. — 118. The management of a suit disputing the validity of the commission, was given to the petitioning creditor; with indemnification to the assignee. 2 Rose, 6. — 119. Upon death of bankrupt, before adjudication of bankruptcy, the commission cannot proceed. 2 V. & B. 29. — 120. *Scus*, if commissioners have dealt in it previous to the death. *Stat.* 1 Jac. 1. c. 15. s. 17. — 121. The having surrendered before, is not essential. 15 Ves. 494. — 122. Commissions not to abate by the death of the king. *Stat.* 5 Geo. 2. c. 30. s. 44. — 123. The commissioners may proceed under the commission, when the bankrupt, by fraud, makes himself accountant to the king. *Stat.* 21 Jac. 1. c. 19. s. 10. — 124. Delaying the execution of the commission, with a view to another arrangement, is an abuse. 6 Ves. 434. — 125. Upon a malicious commission the remedies are, an order by chancellor of a specific sum by way of damages. 1 Atk. 144. 7 T. R. 300. — 126. An assignment of the bond. *Ibid.* — 127. Or an action upon the case. 2 Wils. 145. 3 Burr. 1418. 1 Blk. 427. 8 Rep. 121. 14 Ves. 600. 11 Ves. 415. — 128. Upon a *supersedeas* the attorney is not chargeable with costs, unless guilty of an abuse amounting to contempt; which charge having denied, creditor was left to his action. 15 Ves. 67. — 129. Or unless the commission is fraudulent. 14 Ves. 209. — 130. He is chargeable with costs for obtaining docket by a false description, contrary to Lord Rosslyn's order relative to inserting barristers in country commissions. 15 Ves. 62. — 131. He is chargeable with messenger's fees, and the costs of a suit brought against him for acting under the commission, where the petitioning creditor had absconded. 12 Ves. 549. — 132. Renewed commission on the petition of a creditor, the bankrupt, the commissioners and the assignees being dead. 1 Buck, 134. — 133. The commissioners under a renewed commission, proceed from that stage which was left incomplete by the former. *Cooke*, 12.

So, if the commission abate, or be superseded to the prejudice of any creditors, a new commission may be granted. R. 2 Ca. Ch. 193.

If a new commission be granted, the new commissioners shall proceed where the old ended. 2 Ca. Ch. 193. (k)

(k) The following additional divisions may be subjoined :

- (E) *Evidence*. p. 172.
- (F) *Jurisdiction*. p. 174.
- (G) *Partners*. p. 174.
- (H) *Petition*. p. 180.
- (I) *Actions and Pleadings arising out of or connected with bankruptcy*. p. 184.
- (K) *Proceedings*. p. 186.
- (L) *Documents*. p. 187.
- (M) *Sale*. p. 187.
- (N) *Void Transactions*. p. 188.
- (O) *Wife and Children*. p. 192.
- (P) *Surplus*. p. 196.
- (Q) *Messenger*. p. 197.
- (R) *Reference to Master*. p. 197.
- (S) *Issues*. p. 197.
- (T) *Statutes*. p. 197.
- (U) *Miscellaneous*. p. 198.

(E) *Evidence*. (*vide supra*.)

1. In an action by the assignees, it is necessary to prove the bankrupt to be a trader, the act of bankruptcy, the petitioning creditor's debt, the commission, the assignment, and property in the bankrupt. Bull. N. P. 37. — 2. It has been ruled at *nisi prius*, on the trial of a plea of bankruptcy, that upon the production of the certificate, the time of the bankruptcy is presumptively proved to be on the day of the date of the commission, as it appears in the certificate. And that the time of the act of bankruptcy is presumptively proved, by the act of bankruptcy upon which the commission issued, as it appeared upon the production of the proceedings on the trial. 5 Esp. Cas. 90. — 3. The commission is proved by its production, with the petition upon which it was granted. B. N. P. 37. 5 Taunt. 89. — 4. A bankrupt cannot dispute the validity of the commission under which he has obtained his certificate; as against himself, therefore, its validity is established by producing the commission itself, and the proceedings under it, and proof of his submission. 5 T. R. 655. — 5. The assignment is established by its production, and proof of its execution by the commission. B. N. P. 41. — 6. An assignment is, by the practice of the K. B., admitted without proof, unless particular reasons oppose. 5 Taunt. 89. — 7. Upon an issue on a plea of payment of a debt on bond, at the suit of the assignees of the obligee, the assignment is admitted. 1 Stark. 76. — 8. Certificate may be entered of record, and the record given in evidence. Stat. 5 Geo. 2. c. 30. s. 41. — 9. The certificate of the bankrupt's conformity, with its allowance, is sufficient evidence of the trading, bankruptcy, commission, and other proceedings, precedent to certificate obtained. Stat. 5 Geo. 2. c. 30. s. 7. — 10. The certificate must be produced, unless it be in the hands of the opposite party; in which case, after notice, secondary evidence may be given. 4 Campb. 282. — 11. Where a defendant sets up a certificate, and the plaintiff contends that the bankruptcy relied on is a second bankruptcy, under which the defendant has not paid 15*s.* in the pound, the plaintiff must prove a certificate obtained. But the production of the proceedings under the former commission, wherein the surrender and last examination are stated, is sufficient evidence of such former commission. 3 Esp. 195. S. P. 5 T. R. 655. — 12. To prove that defendant has been before discharged, it is sufficient, after notice to produce the former certificate, that the solicitor under the commission states that he was employed by defendant to obtain the certificate, and that, from the entries in his books, he has no doubt it was allowed. 3 Campb. 499. — 13. Evidence in support of a petition founded upon fraudulent misrepresentation. See 3 V. & B. 108. — 14. Commission and proceedings are not evidence to prove an act of bankruptcy, to defeat a conveyance. 2 Rose, 364. — 15. In an action for a creditor's share (speaking as when such was maintainable,) under an order for a dividend, the proceedings under the commission are conclusive evidence of the debt. Dougl. 407. — 16. The circumstance of the certificate having been prepared before the issuing of the commission, seems to be evidence that the commission is fraudulent. 11 Ves. 422. — 17. Previous agreement between petitioning creditor and a relation of the bankrupt, to guarantee a certain dividend, if

if he will petition, is evidence of a concerted commission. 4 Taunt. 117. — 18. Proof of an antecedent act of bankruptcy, and of a debt upon which a commission might have issued, was ruled to be sufficient to support an ejectment on the demise of the bankrupt, against the assignees. 2 Esp. 595. — 19. In an action for maliciously suing out a commission, to sustain an allegation that commission was duly superseded, a writ of *supersedeas* under the great seal must be produced; nor will the production of an order for a *supersedeas* do. 3 Camp. 60. — 20. But in trover against a sheriff, or the party suing out execution after an act of bankruptcy, the assignees need not prove an actual demand, because the property being vested in the assignees from the time of the bankruptcy, the execution is tortious. Bull. N. P. 41. — 21. It lies on the defendant to prove that he has paid 15s. in the pound under the second commission. 3 Esp. 195. — 22. Concealment of effects to the value of 10*l*. seems to be evidence that certificate was obtained by fraud. Dougl. 216. — 23. If a bankrupt promises to pay when he is able, *semble*, creditor must, to recover, prove his ability. 2 H. B. 116. — 24. In an action against one assignee for contribution at the suit of a co-assignee, who has been compelled to pay the charges of the messenger under the bankruptcy, it need not be proved that the defendant has in his hands any funds from the bankrupt's estate. Holt, 245. — 25. In an action by assignees, defendant cannot establish a plea of set-off by merely proving that his cross demand has been allowed by the commissioners. 3 Camp. 279. — 26. *Semble*, that on an indictment for perjury by a bankrupt, in passing his last examination, it is necessary to go into strict proof of the bankruptcy. 3 Camp. 96. — 27. A bankrupt cannot be a witness to prove property in himself, or a debt due to his estate, unless he has obtained his certificate, and given a release to the assignees of his share in the surplus and the dividends; for he is interested to enlarge the fund. But he may be evidence against the assignees, to prove property in, or a debt due to another; for it is against his interest to diminish the fund. Bull. N. P. 41. Cowp. 70. — 28. A bankrupt, who has obtained his certificate under a second commission, even with a release, is not a competent witness to enlarge the fund; for in the event of his not paying 15s. in the pound under the second commission, his future effects are liable. Peake N. P. 5. Esp. 592, S. C. — 29. In a *qui tam* action on the statute of usury against the assignee of a bankrupt, for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt was offered as a witness, but had not obtained his certificate, and although he offered to release, the court held that he could not be examined; for, notwithstanding the defendant had proved his debt under the commission, which he might do for the very purpose of preventing a certificate, that was no objection to his bringing an action at law, and arresting the bankrupt for the whole debt. 2 T. R. 196. By stat. 49 Geo. 3. c. 121. s. 14. proving or claiming a debt under a commission, is made an election to come under the commission. — 30. A bankrupt, having obtained his certificate under a joint commission against himself and another, is not competent to prove that they were partners; or that they were jointly indebted to the petitioning creditor; or that his partner was a bankrupt. 2 H. Bl. 279. — 31. If the bankrupt give a general release to his assignees, it is sufficient; as it discharges him from receiving any sum of money from the assignees, cited 2 T. R. 497. — 32. In an action against two defendants, where one pleads his bankruptcy, and the other the general issue, the certificate of the bankrupt cannot be produced by the other defendant, so as to enable him to call the bankrupt as a witness. 3 Camp. 283. — 33. Where a bankrupt had obtained his certificate, and received his allowance, the court suffered his evidence to be read; for he is not bound to refund. 1 Bro. 269. — 34. Examination of bankrupt, when taken, not under his own but another commission, is not evidence upon petition to expunge proofs. 2 Rose, 51. — 35. Creditors being obviously interested in the increase of the bankrupt's property, cannot, during the continuance of that interest, be admitted witnesses to support the commission, or to enlarge the divisible fund. 2 Vin. 11. — 36. Creditors, therefore, cannot prove the act of bankruptcy. Peake's Cases, 80, *supra*. — 37. But if a creditor release his debt to the assignees, without executing a release to the bankrupt, he is competent. Cas. Temp. Hardw. 267. — 38. And if a creditor has sold his chance of recovering a debt, and his interest is thereby removed, he is competent to prove the petitioning creditor's debt in an action by the assignees. Blk. 1273. — 39. And it has been held, that a creditor who has not proved his debt under a commission, is a competent witness to support the commission, but not to increase the fund out of which he may receive a dividend. 2 Camp. Rep. 300; and see 1 Taunt. Rep. 71; *sed vide supra*. — 40. Upon an issue out of chancery, to try whether a bankrupt had lost money by gaming, it was held, that a creditor of the bankrupt could not be examined as a witness to prove the fact of his having so lost money; for he thereby increased the divisible fund by depriving

priving him of his allowance. 1 Str. 507. — 41. Defendant's examination before the commissioners may be used to shew, that by his own confession, he had concealed property of the bankrupt. 1 Camp. 30. — 42. And in an action by assignees against an auctioneer, the production of the auctioneer's catalogue, stating the goods in question to be "the property of the bankrupt," was held to supersede the necessity of going through the proofs in support of the commission. 3 Esp. Rep. 340. — 43. Where a bill was brought by assignees, to set aside a fraudulent assignment of an annuity made by the bankrupt, the court refused to suffer the examinations of the defendant's attorney, taken before the commissioners, to be read, as he was not examined in chief in the cause. But the defendant having by his answer set up a different right to the annuity than that in examinations before the commissioners, the court allowed the latter to be read to shew the contrariety and inconsistency. 3 Atk. 415. — 44. If a certificate be impeached on the ground that it was signed by fictitious creditors, they must, if possible, be produced to prove the fraud, as their testimony is open to much observation. 3 Esp. Rep. 261.

(F) Jurisdiction.

1. The jurisdiction in bankruptcy is legal and equitable. 11 Ves. 26. 12 Ves. 348. 15 Ves. 496. — 2. The jurisdiction in bankruptcy is distinct from that of lord chancellor. 6 Ves. 782. 8 Ves. 250. — 3. By the bankrupt statutes, the chancellor exercises a superintending and discretionary power, and may determine in a summary way: notwithstanding which, however, the court conforms itself, by way of analogy, to the ordinary course of proceedings in chancery; which summary jurisdiction too, is confined to transactions between the creditors, the bankrupt, and the assignees. 1 Atk. 77. 209. 3 Atk. 817. 1 Ch. Cas. 232. 275. Sel. Ca. Ch. 15, 16. 2 Ves. 327. 1 Atk. 88. — 4. The power of the court is the same, and no more, upon bill, as upon petition; yet the course by bill seems the most appropriate in cases of importance, and is frequently necessary to settle the demands of the creditors. 1 Atk. 76. Cooke, 2. — 5. Chancellor will direct a *procedendo* upon a commission superseded by vice-chancellor's order, confirmed by chancellor. 1 Buck, 45. — 6. Vice-chancellor may certify the propriety of a *procedendo*, upon a *supersedeas* upon his certificate. 1 Buck, 5. — 7. Jurisdiction over strangers is acquired by their seeking relief under the jurisdiction in bankruptcy. 1 Rose, 181. Ibid. 252. — 8. Whatever it is necessary to decide collaterally to the point of proof, will give jurisdiction. 1 Rose, 15. — 9. The jurisdiction in the case of a fraudulent commission extends to every one engaged. 1 Buck, 247. — 10. As to the jurisdiction to compel a discovery, see 2 Ves. 611. 13 Ves. 189. — 11. Jurisdiction to compel the indorsement of bills upon behalf of one making advances upon goods, as the proceeds of which the bills had been remitted to bankrupt, and possession of them obtained from bankrupt's agent. 1 Rose, 13. — 12. Trustees to deed of assignment of all bankrupt's effects, compellable to produce it before commissioners to prove an act of bankruptcy. 1 Rose, 315. — 13. The bankrupt's interest as part owner of property on board a ship, protected, by ordering the parties, who had dispossessed messenger and used contemptuous language, to give security for answering bankrupt's interest. 8 Ves. 104. — 14. There is no jurisdiction to restore goods seized by messenger. 1 Rose, 25. — 15. The validity of an equitable mortgage will be determined by the court; though, afterwards, there may be a reference to commissioners to see what is due. 1 Mad. 331. — 16. A second mortgagee, not claiming under commission, not compellable to join in a sale obtained by a prior mortgagee, under the General Order, 8th March 1794, not producing enough for both mortgagees. 5 Ves. 357. — 17. *Quære*, whether the chancellor, sitting in bankruptcy, can refer a bill for taxation where there is no commission subsisting. Cooke, 12. — 18. The chancellor has no jurisdiction to appoint a receiver upon a petition in bankruptcy. 1 Rose, 179. — 19. The chancellor may, upon petition in bankruptcy, send a case for the opinion of a court of law. He may likewise direct an issue, when the costs usually follow the verdict at law. Cowp. 742. — 20. Jurisdiction between messenger and solicitor. 12 Ves. 349. — 21. No appeal lies from chancellor's jurisdiction in bankruptcy. 1 V. & B. 211.

(G) Partners.

1. If three are in partnership together, and two reside at a distance from the place of trade, the shutting up of the house of trade, by the managing partner, makes himself only, and not the other two, bankrupt. They had provided a person to manage the concern, which is all that the law requires. 2 M. & S. 556. — 2. Former practice, in case of several partners, was to take out separate commissions against each partner, as well as a joint one against all. 1 Atk. 137. Now, however, separate
creditors

creditors come in under the joint commission, and distinct accounts are kept. Cooke, 9. — 3. A joint commission must be against all the ostensible partners. Willes, 474. n. — 4. A dormant partner need not be included in a commission against the firm. 5 Ves. 424. 17 Ves. 403. 6 Ves. 454. Cooke, 9. But see 3 V. & B. 126. — 5. And where a dormant partner shares only in the profits, without interest in the property, he cannot be included. 17 Ves. 403. — 6. Commission void as to one partner, not available against the other. 15 Ves. 115. — 7. If one of two partners become bankrupt, the solvent partner may, for valuable consideration and without fraud, dispose of the partnership effects. Cowp. 145. — 8. If the right to transfer a bill or note be in several partners, and some of them become bankrupt, and afterwards indorse it, such indorsement, though made to a creditor of the partnership, will confer no title. 10 East, 418. 1 Camp. 279. — 9. One of three partners in a ship and cargo, the cost and outfit of which was 4,568*l.*, pays only 410*l.* in part of his third share, and gives his notes for the remainder; but before they become due, is declared a bankrupt. The other partners cannot, by voluntary discharging the notes, stand in his place for any share of the profits. But the assignees are entitled to a full third, both of the profits of the adventure and of the value of the ship. Cowp. 409. — 10. A separate commission passes joint property. 3 V. & B. 98. — 11. If one of two joint tenants becomes bankrupt, and dies, Billingham thinks, "that there shall be no survivorship, but that his part shall be sold; because, 1. His moiety is bound by the statutes; 2. He might in his lifetime have sold and departed with it; 3. And by stat. 1 Jac. 1. c. 15. the commissioners may proceed in execution in and upon the commission, for and concerning the offender's lands, tenements, &c. in such sort as if the offender had been living; which they cannot do if the survivorship is held to take place. Cooke, 279. Billing. 111. Good. 89. — 12. The partnership is severed by a commission against one of two partners. Hence, a separate commission was established, though the other died before the assignment. 5 Ves. 295. — 13. Joint creditors cannot prove under separate commission, or against separate estate, so as to receive dividends *pari passu* with separate creditors, where there is joint property, however trifling. 2 Rose, 54. 1 Mad. 583. — 14. Or a partner solvent or insolvent. 14 Ves. 447. 449. 1 Buck, 227. — 15. Joint creditors may prove, to vote in the choice of assignees under a separate commission, and take the dividends, provided they pay the separate creditors. 9 Ves. 35. — 16. Joint creditors may prove under separate commission, for the purpose of assenting to or dissenting from the certificate. 16 Ves. 193. 17 Ves. 209. — 17. Joint creditors may prove under separate commission, for the purpose of having separate accounts kept. 6 Ves. 813. — 18. Separate accounts under separate commission will be ordered, upon the application of any joint creditor. 17 Ves. 209. — 19. Joint creditors may prove under separate commission, or against separate estate, though they cannot receive a dividend until separate creditors are paid 2*os.* Cox, 420. 4 Ves. 837. — 20. Unless there is no partner and joint estate. 15 Ves. 52. 2 V. & B. 216. — 21. But the petitioning creditor, though joint, is not within the above rule of exclusion. 14 Ves. 604. — 22. Even though as to part of his debt, he is only a trustee for a separate creditor. 17 Ves. 247. — 23. Petition of joint creditors to prove under separate commission granted, but not to receive a dividend, and dividend reserved till account taken of what they have or might have received from partnership effects. 3 Ves. 258. — 24. Creditors of a partnership which failed in two years, allowed to come upon the separate estate of one partner, in respect of effects taken out of the partnership by him without the privity of the other. 1 Ves. 166. — 25. Under a decree obtained by a separate creditor for satisfaction out of assets, the surviving partner a bankrupt, and the joint estate insolvent, the joint creditors not entitled *pari passu* with the separate creditors to the separate estate; but can only claim the surplus after satisfaction of the separate debts. 9 Ves. 118. — 26. Separate debts being small, and joint creditors residing in Sicily, whither bankrupt had traded, certificate stayed till they had had an opportunity of coming in under commission; and without the usual undertaking to pay the separate creditors, gave them in mean time leave to make such proof as they could, and offered a new choice of assignees. 1 Rose, 266. — 27. See Lord Loughborough's General Order, 8th March 1794. — 28. Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors; each estate is applicable to its own debts. 3 Ves. 240. — 29. Under a joint commission, affairs of separate creditors may be arranged, and also of separate firms of two or more partners. 8 Ves. 545. — 30. Separate creditors who had taken a joint security, permitted, upon giving it up, to resort to their original debts. 7 Ves. 592. — 31. Who may prove under the General Order of 8th March 1794, without an order. 3 Mad. 26. — 32. A separate creditor will be allowed, upon petition, to prove his debt under a joint commission, for the purpose of assenting to or dissenting from the certificate. — 33. Where new partners are taken into a trade, and it is agreed that the stock of,

and debts due to, the old firm, should become the capital of the new partnership, and that the new firm should take upon themselves the payment of the debts of the old firm, and the new partnership become bankrupt, the creditors of the old firm may prove as joint creditors of the new. Co. Bt. Laws, 538. 2 Bro. 595. 6 Ves. 602. — 34. Distribution of partnership effects as joint property, after assignment under an agreement for dissolution, the retiring partner having obtained an injunction and receiver, upon the failure of the other to fulfil his contract. 2 V. & B. 172. — 35. Upon dissolution of partnership between A. & B., it is agreed, that until A. be provided for, B. shall allow him a third of the profits; B. afterwards forms a partnership with C., and carries into it the stock of A. & B.; a commission issues against A. & B. Held, 1. That after the satisfaction of the creditors of B. & C., the joint effects of B. & C. were the separate property of B., and not the joint property of A. & B. 2. Under that agreement, A. is a partner with B. as to a third of his interest, but is not a partner with B. & C. 2 Rose, 252. — 36. Where a joint commission issues, commissioners are to cause distinct accounts to be kept of the joint and separate estates; and separate debts are proveable; and each estate to be applicable, in the first instance, to payment of their respective debts. General Order, 8th March 1794. — 37. Joint estate is first applied to joint, then the surplus to separate creditors, and *vice versa* as to the separate estate. 4 Ves. 840. — 38. Upon the issuing of a separate commission it frequently happened that the assignees possessed themselves of joint property; and the joint creditors, therefore, conceiving themselves entitled to have distinct accounts kept of the joint and separate estates, applied by petition to the lord chancellor for that purpose; but it seems, that unless the petition was consented to, it was thought necessary for the application to be made by bill. 1 Atk. 152. Co. Bt. Laws, 244. — 39. Which practice was accordingly followed for some time. 5 Bro. 457. Co. Bt. Laws, 247. — 40. But it is now the practice to order this arrangement on petition. Co. Bt. Laws, 247. and see *Ibid.* 244. — 41. Though not before the choice of assignees. Co. Bt. Laws, 247. — 42. Under a separate commission of bankruptcy, the joint property is administered as if both partners were bankrupts; viz. in satisfaction of the joint debts, either by bill or petition, in order to ascertain the surplus constituting the separate interests. 10 Ves. 98. — 43. Under joint commission, joint property recalled from a separate estate only as converted by fraud; not, as formerly, by contract express or implied from acquiescence. 2 V. & B. 54. — 44. Exception where one is also engaged in a different concern. 2 V. & B. 54. — 45. One partner absconded and died abroad; separate commission against the other, and seizure of joint effects; joint debts to be first paid out of joint fund, and residue divided between bankrupt's estate and executor. 1 Ves. 256. — 46. Where there were three firms commencing at different periods; upon the bankruptcy of the firm in which they were all engaged, the lord chancellor ordered distinct accounts to be kept of the different partnerships, and of the respective separate estates of the bankrupts. 2 Bro. 15. — 47. But where there have been various partnerships, and a joint commission is taken out against one firm, in which some of the parties were not engaged, there can only be the common order for keeping the distinct accounts of the joint and separate estate. Co. Bt. Laws, 249. — 48. Right of joint creditors, under separate commission, to an account and application of separate estate, limited, as to separate estate, to surplus; not voting in the choice of assignees. 18 Ves. 442. — 49. If a creditor has a joint and several security, he may come in either against the joint or separate estate. He must make an election, for he cannot prove against both estates, to receive dividends at the same time; but when he has made his election, if the other estate should have a surplus, after paying its own debts, he may come in upon the surplus of the other. 5 P. Wms. 405. 1 Atk. 106. *Ib.* 98. Co. Bt. Laws, 249. 10 Ves. 107. 15 Ves. 4. — 50. If the same persons are concerned in several firms, and issue bills on which the names of the respective firms stand, as drawers, indorsers, or acceptors, a party taking such bills, conceiving them to be distinct houses of trade, may prove against each estate. Co. Bt. Laws, 251. 8 Ves. 546. — 51. A creditor who, knowing of the partnership of the parties, takes a bill drawn by all, indorsed by one, is not entitled to double proof, upon the ground that previously to taking the bill, he required and had the indorsement of that one. 2 Rose, 82. — 52. Joint debts, paid by a bill drawn by one of the debtors and accepted by another, each carrying on distinct trades; proof under their separate commissions upon the bill. 2 V. & B. 254. 1 Rose, 441. — 53. Where A. sold goods to B., and other goods to C., and B. & C. joined in a note for the whole; A. was allowed to prove against the separate estate of each, on giving up the joint note. Co. Bt. Laws, 250. — 54. Taking a joint security is not an election to prove against the joint estate. 15 Ves. 4. — 55. Creditor must elect in the first instance against which estate to prove. 10 Ves. 107. — 56. The general rule is, that a creditor, upon joint and several security,

must

must elect before dividend. 9 Ves. 225. Cox, 218. — 57. The rule that a creditor upon joint and several security must elect before dividend, is not applicable to a contract for double security against distinct firms, viz. bills drawn by all the partners upon a distinct firm, constituted by some of them. 1 V. & B. 495. — 58. Provided creditor was ignorant of their identity. S. C. 2 Rose, 36. 37. — 59. The creditor is entitled to sufficient time to examine the accounts of the two estates. — 60. And he may defer his election until a dividend is declared. Co. Bt. Laws, 250. S. C. 2 Bro. 595. — 61. And even if he has received a dividend, the court will permit him to change his proof, upon refunding the dividend received. 3 P. Wms. 405. — 62. But if a dividend has been made upon the other estates, the court will not permit the dividend to be disturbed. 13 Ves. 70. — 63. Where the parties were assignees, and had a sufficient fund to make a dividend, they were ordered to elect in six weeks. Co. Bt. Laws, 250. — 64. Creditor not having received dividend, permitted to waive proof against joint estate; and, not disturbing any dividend made, to prove against separate estate. 13 Ves. 70. — 65. A. carrying on business on his separate account, and also in partnership with B., gives a bill of exchange drawn by himself, to the order of A. & B. and indorsed by them. A. separate commission issues against A.; B. dies; the holder of the bills proves them under A.'s commission; having afterwards learned that distinct accounts were to be kept of the estates of A. and B., he applied to be at liberty to prove against the joint estate of A. and B., in addition to his proof against the separate estate of A. Ordered, that he should be at liberty, either to retain his present proof, or to withdraw it, and prove against the joint estate. 1 Rose, 159. — 66. A. holding the acceptance of B., which he had taken in ignorance that B. was a member of the firm of C. & Co., the drawers, and of which firm one of the members was an infant, proves a debt against the joint estates, under the separate commissions against B. & C. (the infancy of the other partner excluding a joint commission) making his proof, not as against the liability of the parties, arising from the contract on the bill, but upon his right to include or exclude the resort to a dormant partner. Held, that such mode of proof was a conclusive election to resort to the joint funds alone, and discharged the separate estate of the acceptor, from the liability which would otherwise have arisen out of the ignorance of the holder, that the acceptor was a member of the firm of the drawers. 2 Rose, 34. — 67. A joint creditor sues out two separate commissions; under one he proves against the joint estate, and receives a dividend, at which time he was ignorant of his right to prove against the separate estate of the other. Held, that he had not conclusively elected to prove as a joint creditor; but that, refunding the dividend with interest, he might prove as a separate creditor. 1 Buck, 7. 2 Rose, 389. — 68. The rights of joint creditors under a joint commission, or against joint estate, to interest subsequent to commission, in case of a surplus, preferred to a debt from the separate to the joint estate. 9 Ves. 588. — 69. Separate creditors cannot claim interest out of surplus of joint estate, till joint creditors are satisfied. Cox, 275. Cooke, 184. 4 Ves. 677. — 70. Joint creditors have no lien upon partnership effects, until execution; which may be joint or several; their equity after dissolution depends upon the right of the partners. 2 V. & B. 173. — 71. Lien of separate creditors upon surplus of joint estate, admitted where one partner being dormant, joint creditors had, by resorting to, diminished separate, and by exonerating joint estate, had produced a surplus, and to the extent they had so diminished. 2 Rose, 84. — 72. Execution against partnership property upon the bankruptcy of one partner, is not allowable. 11 Ves. 85. 17 Ves. 193. — 73. Where two partners agree to borrow a sum of money for the use of the partnership, but one of them only gave a bond for securing the payment, and the other was a witness to it, and the money was afterwards entered in the cash-book of the partnership, obligee in the bond was admitted a creditor against the joint estate. 1 Atk. 225. — 74. Where a creditor had lent money to two partners upon their joint notes, and upon the separate bonds of each, and the whole of the money was applied to the use of a partnership, consisting of them and several others, and the partners all agreed to consolidate the separate debts, and to consider them as the debts of the new partnership: the creditors were allowed to prove the whole amount against the joint estate of the partnership. 2 Bro. 595. — 75. A father, member of a bank, transfers a sum of money to the credit of his son, with the partnership. For this credit the son is entitled to prove under a commission against the firm. 2 Rose, 384. — 76. A sole trader indebted by bond, took in a nominal partner, but without fraud, two years after the partnership failed; and proof not allowable for that separate debt, under the joint commission, unless something, as payment of interest by both, to make the partnership liable; for which, however, very little would be sufficient. 1 Ves. 131. — 77. A joint note of A. and B. is given for goods sold to A. only, and a receipt given as for money paid; a joint commission issues against

A. and B.; the seller may still prove his debt for goods sold, against the separate estate of A. Cox, 49. — 78. A. B. and C. carried on trade in partnership, and A. and B. were partners in a distinct trade, and became bankrupt. D. being a creditor of the three for goods sold and delivered, could not prove his debt against the joint estate of the two, but was admitted to prove against the separate estate of each. Cox, 372. — 79. A., the partner of B, carrying on business at a different place, draws bills of exchange, sometimes in the name of the firm, and sometimes in his own name, upon the clerk of the partnership, managing the business in London, and discounts them with the bankers in the country. Upon an application by them, that the bills drawn in the separate name of A., might be considered as a partnership debt, from having been applied to the partnership purposes; lord chancellor expressing an opinion against the claim, directed a case. 1 Rose, 61. — 80. A. entering into partnership with B., applies to his bankers for a loan to constitute his capital; they consent, upon condition that B. shall join in a security for re-payment of the loan, which is complied with. The partnership open an account with the bankers, who also continue the private bankers of A. On the bankruptcy of the bankers, the balance on the joint account, arising from this loan, is against A. and B.; but A.'s private account is in his favour. A. and B. were allowed to set off this private balance against the joint debt, it being but a security for the separate. A. and B., soon after the partnership commenced, took in another partner, but it was understood that the account with the bankers was to continue as before. This partner drew checks in the partnership name, and paid them into his private account. The assigness held not entitled to charge the checks so transferred, against the partnership account. 1 Rose, 156. — 81. A., a trader, being indebted to several persons, enters into partnership with B. and brings his stock in trade into the partnership. By the partnership articles it was agreed, that the joint trade should pay the creditors of A., named in a schedule. Held, that a separate creditor of A. named in the schedule, did not by the articles become a joint creditor of A. and B. 1 Buck, 13. — 82. If one partner, being a trustee, brings trust-money into trade without the knowledge of his co-partner, it cannot be proved as a joint debt; for, although the partner abuses his trust, and advances the money to the partnership, it will not raise a contract between the partnership and the person whose money it is. 3 Bro. 265. — 83. Nor can money borrowed by one partner to pay for an estate, but applied by him to pay partnership debts, be proved by the lender against the joint estate. Co. Bt. Laws, 537. — 84. Where a broker insured with an underwriter who underwrote separately, but had partners, and the broker kept an account with the partnership; held, that the proof could not be made against the joint estate, as insurance with a partnership is prohibited by stat. 6 Geo. 1. c. 18.; but the debt was ordered to be proved against the separate estate. 1 Bro. 399, 400. — 85. Where several firms are engaged in a joint adventure, the creditors of the adventure, in case of bankruptcy, and of there being no joint property, must prove against the estates of the individuals, not of the firm. 2 Rose, 393. — 86. Stock, though owned by one partner only, with interest in the profits merely in the others, is administered as to joint creditors, as belonging to all. 2 Rose, 382. — 87. The benefit of an insurance by the bankrupt partner, upon his own account, upon the joint property, not liable to joint creditors. 5 Ves. 575. 6 Ves. 136. 3 Mad. 63. — 88. Upon dissolution of partnership by retirement of a partner, followed by bankruptcy, the right of the joint creditors against joint property remaining in specie, depends upon the *bond fides*. 11 Ves. 3. 1 Rose, 416. — 89. A fair dissolution of partnership between two; one retiring, and assigning the partnership property to the other, and taking a bond for the value, and a covenant of indemnity against the debts; the other continued the trade separately a year and a half, and then became a bankrupt. The lord chancellor was of opinion, that the joint creditors had no equity attaching upon partnership effects remaining in specie; and, at all events, such a claim ought to be by a bill, not a petition. 6 Ves. 119. — 90. Where one of three partners assigned his share to one of the other two partners, and a separate commission afterwards issued against that one of the remaining partners, to whom the assignment was not made; Lord Hardwicke held, that the joint estate of the whole firm should be applied to the payment of the partnership debts. Co. Bt. Laws, 246. Lord Eldon, in commenting upon this case, in *ex parte* Ruffin, thought that the assignment by one partner to one of the other two, materially distinguished it from that case. 91. A partner retired upon a bond for the balance due to him, with a covenant of indemnity, with a surety, being upon the bankruptcy of the remaining partners arrested by the joint creditors, his petition for the application of the specific stock and debts of the old partnership to the creditors of that partnership in preference, was dismissed, with liberty to file a bill. 13 Ves. 347. — 92. Joint creditors under a bankruptcy are bound by a *bond fide* dissolution of the partnership, and an assignment of the partnership

ship estate and effects to one of the partners. But where, after a dissolution and such an assignment, a bill was filed by the retiring partner against the other, alleging fraud in the non-performance of the articles of dissolution, and praying an injunction, and a receiver, which were ordered: held, upon a subsequent bankruptcy, that such interference of the court restored the property to its original character, as joint property; unless the plaintiff in equity had, by his conduct between the times of his obtaining the injunction, and the bankruptcy, rendered nugatory the effect of such interference; and upon that inquiry directed. 1 Rose, 416. — 93. If, in the case of a partnership, one of the partners embezzles part of the partnership effects, and becomes a bankrupt, the assignees can be in no better case than the bankrupt himself; they take only such undivided share or interest as the bankrupt partner himself had, and in the same manner as he had it; that is, subject to all the rights and liens of the other as a partner, and entitled only to the balance of the account after the partnership debts paid, and the deduction for his embezzlement. 2 Vern. 293. Davies, 371. — 94. A transfer of partnership property, after an act of bankruptcy by one partner, is valid for a moiety. 1 Esp. 68. 72. — 95. One partner may be a creditor of another; and, if he continues solvent, may prove his debt under a separate commission against his partner. 1 Atk. 325. 2 Ch. Rep. 226. — 96. If the solvent partner pays more than his proportion of the joint debts, his right to prove must depend upon his having made such payments prior to the bankruptcy. 1 East, 20. 5 Ves. 792. — 97. Where one partner pays his share of a joint debt to another partner, for him to pay the joint creditor, which he omits to do before he becomes bankrupt, this debt is proveable. 1 East, 20. — 98. Proof by solvent partner allowable in respect of misapplication by bankrupt of money paid by solvent partner, as his liquidated share of joint debts 5 Ves. 792. — 99. Secus, in respect of payment by him since bankruptcy, of bankrupt's share. Ibid. — 100. Under a separate commission of bankruptcy, proof of solvent partners having paid the joint debts since the bankruptcy, upon account of a misapplication by the bankrupt to his own use, not by contract, but by fraud, exceeding his authority, and without the privity of his partners. 2 V. & B. 31. 2 Rose, 40. — 101. A partnership is not entitled to prove against the separate estate of an individual member of it, in respect of funds drawn by such member out of the general stock, unless the same have been drawn out fraudulently. 1 Rose, 437. — 102. A solvent partner is entitled to prove against the estate of the bankrupt partner, the amount of the balance due to him upon the partnership account, first satisfying the partnership debts, or indemnifying the bankrupt's estate against them. 2 Rose, 175. — 103. Where one partner carries on a distinct trade, the other partner may, under his commission, prove a debt for goods sold to him by the firm. 1 Rose, 146. — 104. A., induced by the fraudulent representations of B., as to the profits of his business, gives him a certain sum of money for a share of it; on the discovery of the fraud, A. files a bill in equity for an account to have the partnership declared void, and for a receiver. The receiver was ordered; B. becomes bankrupt; petition by A. to be admitted to prove under his commission, refused, with liberty to make a claim. Although A., as against B., might have an equity to say he never was a partner, it would be difficult to say so as against third persons. 1 Rose, 69. — 105. Retired partner, with covenant of indemnity against the debts, in consideration of assigning his share of the property, admitted, under a commission against the remaining partner, to prove a joint debt paid by him, indemnifying the joint estate against the joint debts. 3 Ves. & Beam. 133. — 106. Under a separate commission against one of two partners, the bankrupt having paid 20s. in the pound to all his creditors, obtained an order for the payment of the surplus to him, and the same was accordingly paid to him. Held, that his partner was entitled to apply by petition in the bankruptcy, for an account of such surplus, and for payment of his proportion of it, and that the court had jurisdiction to make the order required. 1 Rose, 442. — 107. A., B., and C. having dissolved partnership without due notice, C. drew without authority, bills in the partnership firm, in favour of D., ignorant of the dissolution, who sued the firm on the bills. C. having pleaded his bankruptcy, D. entered a *nolle prosequi* as to him, and had judgment against A. and B., which was satisfied by money lent on their joint account; and A. and B. were allowed to sue C. jointly for the money paid. 5 East, 225. — 108. The debt due from two bankrupt partners to a third, who has been compelled to pay the sum owing from the partnership, is joint. 1 East, 20. — 109. A creditor may sue the solvent partner, notwithstanding proof under the bankrupt partner's commission. 4 Taunt. 326. — 110. Unless the partner takes the joint property with a fraudulent intent, to augment his separate estate, the assignees on behalf of the joint estate will not be allowed to prove against the separate estate. Co. Bt. Laws, 554. — 111. Under a joint commission, no proof for either the joint or separate estate against the other, unless the debt arose by actual or inferred fraud. 2 V. & B. 210. 1 Rose, 437. — 112. Assignees

under separate commission cannot come upon joint estate for a sum brought by bankrupt into the partnership beyond his share. 1 Ves. 167. — 113. Partners engaged individually in other concerns, if they are distinct, proof may be made of debts as between the different estates; not if merely branches of the joint concern. 11 Ves. 413. And see 1 Rose, 305. — 114. A., B., and C. were in partnership as partners in a distinct house, commissions issued against both firms; the estate of the two were not allowed any thing from the estate of the three, until the joint creditors of the three were fully satisfied. Cox, 440. — 115. Where one partner, with the privity of the other, had taken out of the partnership fund more than his share of the joint stock, the assignees under the joint commission were allowed to prove against the separate estate of the partner, for the amount improperly taken out. Co. Bt. Laws, 533. this appears to be the same case cited as 1 Atk. 225. — 116. And the same rule was followed, where the property had been taken out without the privity of the partner. Co. Bt. Laws, 535. 1 Ves. jun. 166. — 117. Where a partner indorsed or signed the firm of the copartnership to divers bills and notes belonging to the firm, and discounted or pledged the bills, &c. with several persons for money borrowed by him for his separate use, without being brought to the partnership account; and upon the bankruptcy of the firm, the bills and notes were brought against the joint estate; the joint creditors were refused permission to prove the amount of the dividends paid upon such bills and notes against the separate estate of such partner. Co. Bt. Laws, 535. — 118. Where there was a joint commission against two partners, and a separate commission against one of them, the petitioners, assignees under the separate commission, petitioned to be admitted creditors under the joint commission, for a sum of money brought by the bankrupt into the partnership beyond his share; and as being therefore a creditor on the partnership for that sum. But refused, on the principle that he cannot be a creditor on the partnership, in competition with the joint creditors. Co. Bt. Laws, 532. — 119. If there are several partners constituting one firm, and any of them carry on a distinct trade, and in such character, deal with and become creditors of the other firm, and a joint commission issues; proof may be made for such debt, as if they had dealt with strangers. Co. Bt. Laws, 538. 11 Ves. 413. — 120. But it seems, that if the concern carried on by one partner, is merely a branch of the joint concern, proof will not be permitted. 11 Ves. 413. — 121. If the trades should be in the same commodity, it will only be presumptive evidence that they are not distinct. Co. Bt. Laws, 538. — 122. Contribution decreed between the joint and separate estates, the former having paid beyond the proportion of a debt to the crown under an extent, and the bankrupts being bound jointly and severally. 4 Ves. 752. — 123. Under a separate commission, the separate estate is entitled to be reimbursed out of the joint estate, expenses incurred in recovering property for the benefit of the joint creditors. 1 Rose, 201. — 124. Joint creditors, under an order to prove against separate estates, proving against one or more of them exclusively of the rest, the estate so burdened is entitled to reimbursement from the others. 2 Rose, 392. — 125. The assignees of a bankrupt partner are tenants in common with the solvent partner. 11 Ves. 83. — 126. And from being such, cannot have trover against him, or one claiming under him, for the partnership property. 1 East, 363. 368. — 127. One partner cannot be entitled to allowance by himself. 1 Mad. 68. — 128. Partners under a joint commission are not entitled to a double allowance, one in respect of the joint, and the other of the separate estate; but one allowance in respect of their joint and separate effects is to be divided between them, according to the proportions which the surplus of each of their separate estates, after payment of their respective separate debts, and the respective moieties of their joint estate, have contributed to the payment of their joint debts. 1 Bro. 453. S. C. Co. Bt. Laws, 523. — 129. The payment of joint dividends under the usual order, by bankrupt partner, is not considered as a payment under the bankruptcy. Hence, no allowance where joint estate paid 18s., and separate 2s. 1 Rose, 421. 2 V. & B. 209. — 130. Bankrupt not entitled to allowance as against the right of joint creditors to surplus, under separate commission, though separate estate pays 20s. 2 Rose, 95. 3 V. & B. 137. — 131. Bankrupt not entitled to allowance under joint commission, though joint estate pays 10s., unless separate creditors are paid 10s. also. 1 Mad. 68.

(H) *Petition.*

1. After judgment by default in an action upon a dividend under a commission of bankruptcy, the assignees filed a bill for discovery, and to have the proof of the debt expunged; demurrer allowed, the course being by petition. 2 Ves. 666. — 2. To a bill by a bankrupt, who had taken the benefit of an insolvent debtor's act, and his assignees under that act, against the assignees under his commission, and others, stating improper conduct and collusion; and that all or most of the creditors under the

the commission were satisfied, and praying an account; a demurrer, on the ground that the mode of proceeding was by petition in bankruptcy, was allowed. 1 Rose, 79. — 3. An order on a person to attend the commissioners to be examined, can only be by petition, not on motion. 1 Rose, 192. — 4. Equitable relief under a second commission against an uncertificated bankrupt, with suggestion of property acquired in the subsequent trade, and want of notice by the subsequent creditors, refused on petition, with liberty to file a bill. 3 V. & B. 105. — 5. The drawer of a bill of exchange discounts it with his banker, who became bankrupt before the maturing of the bill, having a cash balance of the drawer in his hands. Petition by the drawer and acceptor, that the assignees might be restrained from proceeding at law on the bill, upon payment to them of the difference between the cash balance and the bill, dismissed. 1 Rose, 320. — 6. Whether a debt may be proved or not, may be discussed in the matter of the bankrupt: where property is sought to be divested, a bill is necessary. 2 Sch. & Lef. 228. — 7. Though an order might be made upon part of a petition in bankruptcy, viz. for interest against an assignee, who did not pay into the bank, appointed by the creditors, under the act of parliament, the petition also praying his removal, with much groundless imputation, the whole was dismissed with costs; without prejudice to another petition, confined to the proper object. 13 Vcs. 270. — 8. The general rule in bankruptcy is, that if the petitioner do not pay his costs, he cannot have them. 1 Buck, 215. — 9. Costs given under the word expences, though not specifically prayed by the petition. 1 Rose, 204. — 10. General Order of the 12th August 1809, as to bankrupt's petitions. 1 Rose, vii. 16 Vcs. 320. — 11. The General Order 12th August 1809, will not be dispensed with, unless under special circumstances, verified by affidavit. 1 Rose, 97. — 12. Agents in town permitted to sign for principals in the country, a petition in bankruptcy; the agents undertaking to be answerable for the costs. 1 Rose, 231. — 13. The General Order of 12th August, 1809, held to be complied with by the solicitor "authenticating" the signature of the petitioner, without "attesting" it. The object of the order being to secure the responsibility of a solicitor to the propriety of the application. 2 Rose, 83. — 14. A petition presented by assignees must, under the General Order, 12th Aug. 1809, be signed by all who present it, and not by one only, as in the case of partners. 1 Buck, 109. — 15. Application to permit a petition to be signed by the petitioner's agent in London, granted, it being near the end of the sittings after Trinity term. 1 Buck, 255. — 16. Bankrupt petition witnessed by the agent of the attorney who presented the petition, not a sufficient compliance with the General Order, requiring the attestation of the attorney who presents the petition. 1 Mad. 75. — 17. Solicitor, on his own behalf, presenting a petition in bankruptcy, an attestation was, on an application for that purpose, dispensed with. 1 Mad. 446. — 18. A petition in bankruptcy, attested by the agent of the attorney for the petitioner, and authenticated by his attorney, is a sufficient compliance with the General Order of 12th August, 1809. 2 Mad. 259. — 19. Petition, the affidavit in support of which had been sworn before a master extraordinary, who was solicitor to the commission, ordered to stand over, with liberty to file another affidavit. 1 Rose, 145. — 20. An affidavit in support of a petition cannot be read, if sworn before the petition was answered. 2 Rose, 246. — 21. Affidavits in support of petitions filed subsequently to the petition-day, cannot be read. 2 Rose, 161. — 22. Affidavits on petitions in bankruptcy may be filed after the petition-day; but the petition in such case stands over, to give time to answer them. 2 Mad. 184. — 23. Affidavits in reply are only to be permitted in cases where new matter is introduced in the affidavits answering the petition. 1 Buck, 244. — 24. A party having an objection of form to a petition, ought to be prepared to answer the merits, if the objection is over-ruled; and if it is necessary that the petition should stand over, to enable him to file affidavits, he pays the costs. 2 Mad. 261. — 25. An application that a petition just called on may stand over, will not be granted, unless upon payment of costs by the party making it. 1 Rose, 24. — 26. Petition not to stand over for the purpose of replying to affidavits, unless the application be made at least two days before the petition appears in the paper. 1 Buck, 232. — 27. Where an issue is directed on a petition to supersede a commission, the petition will be ordered to stand over to a time fixed, as that by which the issue will probably be determined; at which period the petition will be dismissed, if the issue has not been tried, unless the bankrupt make an affidavit explanatory of the delay. 3 Mad. 371. — 28. Petition to expunge a charge of collusion made in another petition, and to be heard before that petition, dismissed with costs. That other petition coming on to be heard, and the charge of collusion being unfounded, it was dismissed with costs as against the party so charged. 1 Buck, 132. — 29. A person keeping out of the way, to avoid the service of an order made upon petition in bankruptcy, it was ordered, upon motion, that service at his office should

be good service. 1 Buck, 38. — 30. After an order in bankruptcy, with liberty to bring an action, with special directions for a production of papers, and not to set up the bankruptcy, a bill of discovery cannot be filed. 18 Ves. 209. — 31. Petition amended, paying the costs of the day. 2 Rose, 368. — 32. Petition allowed to stand over, to amend the title. 1 Buck, 230. — 33. Title of a petition in bankruptcy allowed to be altered, on paying the costs of the day. 1 Mad. 309. — 34. Order relative to the reinstatement, in the vice-chancellor's paper, of petitions, or insertion in the chancellor's, petitions struck out of the vice-chancellor's paper for non-attendance. 1 Buck, 107. 2 Mad. 146. — 35. Attorney, under the circumstances, ordered to pay the costs of an improper petition in bankruptcy. 1 Mad. 78. — 36. Assignee under a commission of bankruptcy, cannot maintain a petition against a person not claiming under the commission. 19 Ves. 46. — 37. One of two assignees having quitted the country, a petition was presented by the remaining assignee, that the bargain and sale to the two assignees might be vacated, and that a choice should be made of a new assignee in the stead of the one abroad, and that a new bargain and sale might be executed to the petitioner and the new assignee; and that service of the petition, at the last place of residence of the assignee abroad, might be deemed good service. On production of an affidavit of service of the petition, an order was made according to the prayer of the same. 3 Mad. 23. — 38. Bankrupt permitted to petition against the commission in *forma pauperis*. 2 V. & B. 124. — 39. A petition to supersede a bankruptcy, must not be presented pending an action in which the validity of the commission is to be litigated. 3 Mad. 228. — 40. Petition to supersede a second commission, must be served on the assignees under the first. 1 Mad. 74. — 41. Upon a petition to supersede a commission, the bankrupt's examination before the commissioner is evidence to show that the petitioner is not a creditor, although the petitioner was not present at the examination. 1 Buck, 98. — 42. Upon a petition to supersede a commission, the proceedings must be produced. 1 Mon. Bt. Laws, 604. — 43. Petition to prove a debt in bankruptcy irregular, because the creditor did not go before the commissioners till after it was presented, and because brought to hearing without stating what passed before them. 2 Ves. 41. — 44. Application to the lord chancellor in bankruptcy, before the decision of the commissioners, to receive or reject proof of a debt, with the view to the choice of assignees, improper. 1 V. & B. 280. — 45. On petitions in bankruptcy to be admitted to prove debts, which have been rejected by the commissioners, the petitioners ought to state to the court, in the first instance, the grounds of the commissioners' objection. Cox, 308. — 46. A petition to be admitted to prove a debt, which the commissioners had rejected, should state the grounds of their rejection. It appearing, in this case, that the bankrupt was in custody at the suit of the creditor, and that, previously to the proof, the commissioners insisted upon his discharge, the petition was dismissed with costs. 1 Rose, 274. — 47. A petition to prove, on a refusal by commissioners, must not exceed the sum first proposed. 3 Mad. 132. — 48. Petition by the bankrupt to expunge the proofs of various creditors, dismissed, as being multifarious; costs not given out of the estate, on the ground that it would be hard upon the other creditors whose debts were indisputable. 1 Buck, 256. — 49. One of two partners, the other being abroad, proves a debt and dies. Service of the petition to expunge the debt upon the attorney appointed to receive the dividends, ordered to be good service, upon motion. 1 Buck, 200. — 50. Order made on motion that service of a petition in bankruptcy, on the attorney of a person abroad, whose debt was sought to be expunged, should be deemed good service. 3 Mad. 116. — 51. Practice on petitions to pay dividends upon a debt proved. 2 Rose, 161. — 52. Any creditor who has proved a debt under a commission, may oppose the allowance of the certificate, although his debt does not amount to twenty pounds. Stat. 5 Geo. 2. c. 30. s. 10. 7 Vin. 134. — 53. If a person has been admitted as a claimant under a commission, he may oppose the allowance of the certificate. 1 Atk. 73. Ibid. 81. — But if a long account is to be taken, and the bankrupt swears positively that the balance on taking the account will be in his favour, and the petitioners who oppose the allowance of the certificate, do not venture to swear that there will be any balance in their favour; the lord chancellor will not stay its allowance. 1 Atk. 81. — 55. For barely coming before the commissioners, and saying there is such a debt, is not sufficient without an affidavit. 2 Ves. 249. — 56. Creditors who have signed the certificate, may be heard against its allowance; and the allowance has been sometimes refused and sometimes adjourned, even where there has been no opposition. Many years may intervene between the signing and the allowance of the certificate; and large effects may in the meantime come to the bankrupt; and the future allowance ought not to overreach them. 2 Burr. 718. — 57. Creditors were formerly permitted, by an order from the great seal, to prove their debts under a commission, for the purpose of opposing the allowance of the certificate, without

without being restrained from proceeding at law for their debts. 7 Vin. 134. 1 Atk. 219. 221. 3 Bro. 216. Co. Bt. Laws, 130. 14 Ves. 495. — 58. But by st. 49 Geo. 3. c. 121. s. 14. proving or claiming a debt under a commission, for any purpose whatever, is made an election by the creditor, to take the benefit of the commission with respect to such debt. — 59. Creditor who has not come in under the commission, and has the means of trying the validity of the certificate at law, cannot petition to stay the certificate. 1 Buck, 225. — 60. Where a petitioner prayed the lord chancellor to stay a certificate, in order to give him an opportunity to prove his debt; but did not account for his not having applied before; the lord chancellor dismissed the petition. 2 Bro. 48. — 61. If a petition is presented against the certificate, on or before the day appointed for the allowance, it is immediately stayed, and the petition set down to come on in the usual course. The petition must be served on the bankrupt, that he may have an opportunity of answering the allegations. Co. Bt. Laws, 463. — 62. Petition by a creditor, having the bankrupt in execution, to prove, for the purpose of preventing the certificate, then before the lord chancellor for allowance; waiving the dividend; the bankrupt having been so before. The petition as to staying the certificate dismissed with costs; with liberty to prove. 14 Ves. 138. — 63. Motion on Saturday the 11th, the last day for presenting a petition against a bankrupt's certificate, that a petition prepared, but not properly signed, might be ordered to be received on Monday the 13th, and considered as presented on the 11th, refused. 1 Mad. 111. — 64. *Seemle*, a petition to stay a certificate prospectively, cannot be supported. 1 Buck, 39. — 65. Bankrupt not served with a petition to stay his certificate, on which an attendance had been ordered, entitled to his certificate; and not bound by taking copies of the affidavits. 1 V. & B. 543. — 66. Petition to stay certificate not being served till the day of petitions, though not answered till the day before, the bankrupt declared entitled to his certificate. Cooper, 97. — 67. Petition to stay certificate must be served before petition-day. 2 Rose, 187. — 68. Petition to stay a certificate, must be personally served on the bankrupt before the petition-day. 1 Buck, 38. — 69. Though a bankrupt applies to the court to have a petition to stay his certificate advanced, yet that is not a waiver of his right to be personally served before the petition-day. 1 Buck, 39. — 70. Whether affidavits to stay a bankrupt's certificate, filed after the petition presented, must be confined to replying to new matter introduced by the bankrupt, *Quere*. 10 Ves. 359. — 71. Affidavits in support of petitions to stay certificates, are from necessity an exception to the rule, that affidavits sworn previously to the answering of the petition, are inadmissible in evidence. 2 Rose, 257. — 72. General order in bankruptcy, that affidavits in support of a petition to stay the certificate, shall be brought into the office together with the petition, except such as shall be necessary in reply to affidavits in answer to it. 11 Ves. 540. — 73. An affidavit in support of a petition to stay a certificate filed after the petition is presented, cannot be read. 1 Buck, 178. — 74. Upon petition to stay a bankrupt's certificate, affidavits filed after the petition presented, admitted only in reply; according to the General Order, 16th Nov. 1805. 1 Ves. & Beam. 5. — 76. If a creditor believing a commission to be invalid, does not prove under it, but acting adversely, declares to the bankrupt and his friends, that he means to petition for a *supersedeas*, and to stay the certificate, unless his debt be paid or satisfied, that is not such a tampering as will operate in bar to his petition. 1 Rose, 402. — 77. A petition to stay a certificate, is an exception to the regular course of proceeding, and may be heard out of its turn. 1 Rose, 93. — 78. Upon a petition to stay a certificate, imputing conduct to the bankrupt, which if proved would amount to felony, the court will not direct an issue to try the fact of conformity. 1 Buck, 275. — 78. If a creditor is induced by money to withdraw a petition presented against the certificate, or after such a petition, sells his debt, with an agreement to withdraw his petition, it will avoid the certificate; and to prevent such practices, petitions against a certificate are not now allowed to be withdrawn as of course. Co. Bt. Laws, 465. — 79. By a General Order, if any solicitor shall refuse or neglect to take away from the office, the order made upon the hearing of any petition presented against the allowance of a bankrupt's certificate, within three months from the time such order is made, such bankrupt's certificate is to be laid before the lord chancellor for his allowance and confirmation, notwithstanding any order pronounced for staying the same. General Order, 22d Mar. 1796. — 80. To a petition by a petitioning creditor that the assignees may, out of the funds in their hands, pay the solicitor's bill up to the choice of assignees, and which had been taxed by the commissioners, it is a sufficient objection that the commissioners have allowed charges in it which ought to be expunged. 1 Rose, 397. — 81. The court has not jurisdiction to appoint a receiver upon petition in bankruptcy. 1 Rose, 179.

(I) *Actions and Pleadings arising out of or connected with bankruptcy.*

1. A demand and refusal is necessary, to enable the assignees of a bankrupt to sue in trover for goods, collusively sold in contemplation of bankruptcy. 2 H. B. 135. — 2. Party, to whom commissioners assign bankrupt's estate, for use of creditors, may recover in his own name. Stat. 1 Jac. 1. c. 15. s. 15. — 3. The st. 1 Jac. 1. c. 15. s. 11 & 12, and 5 Geo. 2. c. 3. s. 29. provide that, if any person shall be convicted by indictment for falsely swearing to a debt under a commission of bankruptcy, he shall forfeit double the sum so sworn to, to be appropriated to the use of the different creditors; under which acts, the bankrupt's assignee, as organ of the creditors, may sue. 7 T. R. 458. — 4. If a bond is made to a trustee, in trust for one who becomes a bankrupt, the assignees cannot bring the action in their own name, but must sue in the name of the trustee. 1 Atk. 193. — 5. If a creditor to whom a bill has been transferred by a bankrupt partner, receive the money due thereon, the solvent partners, together with the bankrupt's assignees, may join in an action for the money received. 10 East, 418. — 6. In trover, the non-joinder of a co-assignee is only matter in abatement. 5 East, 407. 1 Smith, 487. — 7. If in trover a co-assignee is not joined, those who sue alone can recover only their proportionable shares. Ibid. — 8. A party cannot disaffirm by one action what he has affirmed by an antecedent one. If, therefore, the assignees of a bankrupt, in an action against A. for the bankrupt's money, refuse to admit his defence, that he has paid it to B. under the bankrupt's order, they cannot afterwards sue B. for the money. In the former action, they disaffirmed A. for their agent; by the latter, they would affirm him. 2 T. R. 287. — 9. Where a bill was filed by a creditor, upon a debt accruing after the bankruptcy, against the executor of the bankrupt, and his assignees, for an account as having a surplus, and to re-train the assignees from paying the surplus to the executor; the assignees demurred, and their demurrer was allowed; the executor only being liable to the creditor, and the assignees to the executor only. 4 Bro. 270. 2 Ves. jun. 95. — 10. Such assignees as refuse to join as co-plaintiffs in a suit by the others, may be made defendants. 2 Rose, 371. 1 Mer. 244. — 10. Where several are joint contractors, all must be sued, though one is a certificated bankrupt. 2 M. & S. 25. — 12. Assignees may sue in the *debet* and *detinet*, because the whole property of the bankrupt is vested in them by law. 2 T. R. 45. — 13. If after an act of bankruptcy, a person receive goods from the bankrupt, and convert them into money, his assignees may either affirm the contract, and bring an *indebitatus assumpsit* for the money; or disaffirm the contract, and bring trover for the goods. 12 Mod. 324. 7 Mod. 461. 2 Blk. 827. 3 Wils. 304. — 14. If they bring one action, and proceed to judgment in it, they cannot bring the other. 12 Mod. 324. 3 Wils. 304. 2 Blk. 827. — 15. The assignees have the option of bringing either trover or *assumpsit*, against one who has sold the bankrupt's goods, and received the price since the act of bankruptcy. 2 T. R. 141. — 16. The assignees may either have trover or *assumpsit* against the vendee of the sheriff, or the plaintiff in the original action, if he has received the money of the sheriff. 3 Wils. 304. 1 Ld. Raym. 724. And in trover against the original plaintiff, the sheriff need not be joined in the action. 2 Stra. 996. — 17. Assignees cannot sue for money, received in payment of a bill indorsed by the bankrupt to a creditor, after act of bankruptcy. They must bring trover. 1 Stark. 481. — 18. If a fraudulent preference has been given by a bankrupt to one of the creditors, the assignees may either affirm or disaffirm the transaction; by affirming it, they place themselves in the bankrupt's situation, and admit the defendant to all those privileges to which, as against the bankrupt himself, he would have been entitled; amongst others, to the right of setting off a debt on mutual credit, under stat. 5 Geo. 2. c. 30. s. 28. They affirm the transaction by bringing a suit *ex contractu*, even though they lay the contract as made with themselves; they disaffirm it by a suit *ex delicto*. 4 T. R. 241. — 19. Action for money had and received will not lie by assignees, to recover India stock, transferred by the bankrupt after an act of bankruptcy. 5 Burr. 2589. — 20. Where a creditor receives money as the proceeds of the bankrupt's property, though it be not the identical sum received from the sale, the assignees may recover it by action of money had and received. 1 M. & S. 583. — 21. The property of a bankrupt is vested in his assignees by the assignment, from the act of bankruptcy by relation; and therefore, if a sheriff takes the bankrupt's goods in execution after an act of bankruptcy, and before the commission, but sells them after the issuing the commission, the assignees may have trover against him, but they cannot have trespass; not even where the sheriff levies or pays over after an act of bankruptcy of which he has notice. 1 Burr. 20. 1 T. R. 475. Comb.

Comb. 123. S. C. 1 Show. 12. — 22. An action of debt, on a simple contract, cannot be maintained by assignees against an executor. Cro. Car. 209. — 23. The proper course for recovering the penalty under statutes 1 Jac. 1. c. 15. s. 11 and 12. and 5 Geo. 2. c. 30. is by action. 7 T. R. 458. — 24. Assignees, suing upon contract made with bankrupt before bankruptcy, must sue as such. Cowp. 569. Wightw. 65. 10 East, 61. — 25. Assignees suing upon contract made with bankrupt since bankruptcy, need not sue as such. Cowp. 569. Wightw. 65. 10 East, 61. — 26. In an action by the assignees to recover back money paid by the bankrupt, after he had committed an act of bankruptcy, and before the commission was opened, it is not necessary for them to declare as assignees. Wightw. 65. — 27. In actions by assignees, it is not necessary for them to set forth the commission and proceedings at large, or how the party became a bankrupt, but they may declare shortly. Ld. Raym. 1546. 2 T. R. 45. — 28. An assignee appointed in room of one displaced, declaring upon judgment recovered by the former assignee, may state generally that himself has been duly constituted and appointed assignee. 10 East, 61. — 29. If A. and B., separate traders, become bankrupt, and C. is chosen assignee under each commission, he cannot, in one and the same action, recover demands due individually to A. and B. A. and B., had they remained solvent, could not have sued jointly, neither can he who is their representative. 3 T. R. 433. — 30. If the same set of assignees are chosen, under one commission, against A. and B. partners; and another against C., not in partnership with A. and B.; they may declare as assignees of A. and B., and also as assignees of C., for a joint demand due to all three. The only objection that could be raised would be, that it appears that a joint commission has been issued against two of three partners; but none can be raised, since *non constat* from the declaration, that C. was in partnership with A. and B. 3 T. R. 779. — 31. Assignees may describe themselves as assignees of partners generally, though there are separate commissions against each. 15 East, 428. — 32. Where partners commit acts of bankruptcy at different times, and in the interim between each, money belonging to the partnership is received by a third person, the assignees, under a joint commission against both, must declare for it, as money received to the use of themselves and the then solvent partner. 3 B. & P. 465. — 33. Assignees of A. and B. may sue for a debt due to the separate estate of A., without naming B. 3 Camp. 399. — 34. Counts, on the promise of the defendant and another, who has since become a bankrupt and obtained his certificate, may be joined with counts on promise of the defendant alone. 6 Taunt. 179. — 35. In an action of *assumpsit*, except there has been an express promise to the assignees, the right way of declaring is, to lay the promise to have been made to the bankrupt. 6 Mod. 151. 7 Vin. 139. 2 Stra. 697. — 36. In debt on specialty, assignees need not make proof of the deed; because they are in by act of law, and may not have the means of obtaining the obligation. Cro. Car. 209. — 37. In an action, by the assignees of a bankrupt, for the penalty under statutes 1 Jac. 1. c. 15. s. 11 and 12. and 5 Geo. 2. c. 30. s. 29. no objection can be made to the indictment upon which it is founded, which is conclusive in such collateral proceeding. 7 T. R. 458. — 38. In an action, by the assignees of a bankrupt, for the penalty under statutes 1 Jac. 1. c. 15. s. 11 and 12, and 5 Geo. 2. c. 30. s. 29. it is sufficient to state the defendant's previous conviction on the indictment for perjury, without averring that the defendant took the oath in question. 7 T. R. 458. — 39. In the case of an express promise, after certificate, the creditor may declare on the original cause of action; and, if the certificate be pleaded, the subsequent promise may be given in evidence. Peake, 68. — 40. But if the promise be only conditional, the plaintiff must declare specially, and prove the condition performed. 4 Camp. 205. — 41. In an action for falsely and maliciously suing out a commission of bankrupt, it is unnecessary to aver that plaintiff was not indebted. 2 Wils. 147. — 42. By stat. 5 Geo. 2. c. 30. s. 7. if any bankrupt shall be arrested, prosecuted, or impleaded for any debt due before he became bankrupt, he shall be discharged upon common bail, and may plead in general, that the cause of such action accrued before he became bankrupt, and may give the act and the special matter in evidence; and the certificate and the allowance thereof, according to the directions of the act, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate, and a verdict shall thereupon pass for the defendant, unless the plaintiff can prove the certificate was obtained unfairly and by fraud, or unless the plaintiff can make appear any concealment by the bankrupt to the value of ten pounds; and if a verdict pass for the defendant, or the plaintiff is nonsuited, or judgment is given against the plaintiff, the defendant shall recover his full costs. — 43. By sect. 41 of the same act, a copy of the certificate may be given in evidence, if signed and attested, and entered of record as therein directed. — 44. The general plea

plea of bankruptcy is proper, if the certificate be allowed any time before plea pleaded, though after the commencement of the suit, provided the defendant were a bankrupt before. 9 East, 82. — 45. Upon a general plea of bankruptcy, under 5 Geo. 2. c. 30. to an action on a bond, the plaintiff may give in evidence the condition (without having set it out on the record) to shew that the action is not barred by the certificate. Dougl. 160. — 46. Evidence of gaming, invalidating the certificate, is admissible under the *similiter* to the general plea of bankruptcy. 1 S. & B. 22. — 47. Where a bankrupt acceptor pleads his certificate, he is, *prima facie*, discharged. if it appear that the commission was sued after the day on which the bill bore date, though before it became due. 5 Esp. 90. — 48. Bankruptcy and certificate, in a foreign country, cannot be pleaded in the general form given by stat. 5 Geo. 2. c. 30. s. 7. 2 H. B. 553. — 49. No one but the bankrupt himself can avail himself of the general form of pleading given by the statute. 1 B. & P. 448. Id. 450, n. — 50. Plea of bankruptcy to a bill, by heir at law, against devisee, overruled as bad in point of form, not averring distinctly and in succession, the facts upon which the bankruptcy rested. Not sufficient, for the purpose of such a plea, to state that the plaintiff was duly found a bankrupt under the commission. 3 Mer. 667. — 51. Plea of bankruptcy, generally after the making of the promises, without stating that the defendant conformed to the statutes of bankruptcy, &c. held good. 2 Smith, 439. 6 East, 413. Cooke, 518. — 52. A general plea of bankruptcy under stat. 5 Geo. 2. c. 30. s. 7. must pursue the form prescribed by that statute, by stating, that the cause of action accrued before the bankruptcy; merely to allege that the contract in question was concluded before, is insufficient. 4 T. R. 156. — 53. A bankrupt cannot give his certificate in evidence under the general issue. 1 Camp. 363. — 54. A bankrupt, wishing to avail himself of his certificate, under 49 Geo. 3. c. 121. s. 8. must plead it. 12 East, 664. — 55. Plea *quis darreign* continuance, that defendant became a bankrupt, cannot be rejected by the court, if verified by affidavit; but the plea must allege that he hath conformed, or it is bad. 2 Wils. 179. — 56. A plea of the plaintiff's bankruptcy must be put in upon oath. 2 Cox, 44. — 57. The assignees of a bankrupt succeed to all his rights and privileges in respect of the property assigned; therefore, to an estoppel between him (a landlord) and his tenant, who, consequently, cannot plead *nil habuit in tenementis*, to covenant brought by the assignees for rent. 7 T. R. 537. — 58. Commissioners, when sued, may plead the general issue, or a general plea in justification. Stat. 1 Jac. 1. c. 15. s. 16. — 59. Wherever, by an act of parliament, a defendant is permitted to plead generally, and give the special matter of his defence in evidence; this privilege is reciprocal, and the plaintiff may also give all special matters in evidence which tend to answer the plea, and support his demand: thus, in the case of a general plea of bankruptcy. 2 T. R. 640. — 60. If a pleading properly concludes to the country, the only mode of replying is to join issue. Therefore, there cannot be a special replication to a general plea of bankruptcy, which, under the statute, concludes to the country; and though there was such replication in Dougl. 461. yet there was no objection. 2 M. & S. 549. — 61. A replication to a general plea of bankruptcy, stating the special matter, is bad on special demurrer. 3 Camp. 499. n. 2 M. & S. 549. — 62. Losses by gaming may be given in evidence under the general plea of bankruptcy. Holt, 520. — 63. The same particularity, and no more, required in an original action is requisite in a declaration in *scire facias*. Therefore, a declaration in *scire facias*, brought by the assignees of a bankrupt, to revive a judgment obtained by him, may state generally, that he became a bankrupt within the meaning of the statutes, &c.; and that his goods, &c. were assigned to them. 2 T. R. 45. — 64. A *scire facias* to have execution of the future effects of a trader twice a bankrupt, whose estate, under the second commission, did not pay 15s. in the pound, must aver that fact; since the provision of the stat. 5 Geo. 2. c. 30. which gives the right, says, "unless the estate shall produce 15s.;" so that the rule, that where an exception is introduced in the clause giving a right, it must be negated by the party asserting the right, applies. 7 T. R. 27. — 65. An action lies under stat. 5 Geo. 2. c. 30. s. 9. against a bankrupt whose estate, under a second commission, produces less than 15s. in the pound, and notwithstanding the plaintiff may have signed his certificate under the second commission. 5 T. R. 287. — 66. A judgment recovered by an assignee displaced, was "for damages sustained for injuries committed, as well by the defendant against the bankrupt before his bankruptcy, as against the assignee as such since." It was presumed, for injuries done to the estate. 1 East, 61.

(K) Proceedings.

1. Books of the bankrupt noticed or referred to by him on his last examination, form part of the proceedings under the commission, to be delivered with costs to the

the assignees, by any person, who, by refusal to part with them, renders an application to the great seal necessary for the obtaining of them. 1 Rose, 395. — 2. Depositions upon which commissioners have founded a report upon a reference to them, are proceedings in the bankruptcy, and, as such, to be left in the custody of the assignees. 2 Rose, 19. — 3. The assignees, not the commissioners, are entitled to the custody of the proceedings. Cooke, 105. 15 Ves. 293. — 4. Assignees or solicitor under the commission, not permitted to say that they are in any person's hands but their own. 1 Rose, 134. — 5. The clerk of enrolments is not entitled, as against the assignees, to a lien on the proceedings for the expences of their enrolment, upon an order obtained by the bankrupt. 1 Rose, 275. 19 Ves. 161. — 6. The depositions taken before the commissioners are not of a public nature, but taken to defend themselves; therefore, the court will not order a copy of them. 1 Ld. Raym. 153. Cooke, 105. — 7. Solicitor not bound to produce proceedings upon a *subpœna duces tecum*. The course is, to apply for an enrolment, and then take a copy. 4 Esp. 43. — 8. The proceedings under a commission of bankruptcy, superseded, ordered to be produced at the hearing of the cause in the court of chancery in Ireland, with a view to evidence from the bankrupt's examination; but not of course. 11 Ves. 557. — 9. Commission of bankruptcy superseded, and an action brought, the lord chancellor ordered the commission and proceedings to be delivered by the solicitor to the secretary, and by him to the associate, to be produced on the trial, with liberty to inspect and copy. Such an order properly refused by a judge. 19 Ves. 162. 1 Rose, 276. — 10. Proceedings under a commission of bankruptcy in the secretary's office, not permitted to be used as evidence in actions by strangers, unconnected with the commission. 8 Ves. 314. — 11. Where a bill was brought by assignees for a discovery of the bankrupt's effects, the court refused the defendants permission to look into their depositions taken before the commissioners, in order to make their answers consistent. 1 Atk. 288. — 12. Proceedings to be enrolled. Stat. 5 Geo. 2. c. 30. s. 41.

(L) Documents.

1. General inspection of a bankrupt's books, for the purpose of getting rid of the certificate by proving gambling transactions, refused. 6 Ves. 614. — 2. A person having a deed in his possession, that in effect amounted to an act of bankruptcy, one of the parties was ordered to attend the commissioners with it, without prejudice to any objection being taken before them as to disclosure of confidential communications. 1 Buck, 17. — 3. If a solicitor, not being the bankrupt's solicitor, has in his custody a deed of assignment executed by the bankrupt, he must produce it, if required so to do by the commissioners. 1 Buck, 110. — 4. Where the commissioners refused to proceed in the bankrupt's examination, unless he produced his books, &c. which were in the office of a master of the court of chancery in Ireland, or copies of them, an order was made, declaring that such books or copies must, if required, be produced at the expence of the estate. 2 Rose, 164. 3 Ves. & Beam. 94. — 5. A bill of exchange on which the commission was sued out, ordered to be left with the assignees, and enrolled of record with the commission and proceedings. 2 Rose, 188.

(M) Sales.

1. Commissioners not to decide, whether an estate of bankrupt shall be sold or not; there must be an order for sale; any creditor has a right to insist on it. 1 Ves. 169. — 2. Commissioners of bankrupt may order the bankrupt's estate to be sold in the country, without any order of the court. Cox, 225. — 3. The advertisements in cases of sales before commissioners should not be general, but should name the hour; and after the time is expired, if the commissioners are not gone, they ought to admit a better bidder; if they do not, the court, upon petition, will open the bidding. 1 Atk. 202. — 4. Upon bankruptcy, the mode of selling an estate is left to the commissioners, not directed by the court, as in a sale by a master. 1 Ves. 112. — 5. The assignees may sell the bankrupt's property by private contract. 3 Rose, 66. — 6. The sales are liable to the auction duties. 1 Esp. 699. — 7. In bankruptcy, application to open biddings after deed executed, and the purchaser put into possession, too late. 1 Ball & Beatty, 209. — 8. When a sufficient advance is offered, and the application is recently made, biddings in bankruptcy may be opened. 1 Ball & Beatty, 210. — 9. Only the assignees of the debtor making the pledge, can insist upon its being sold. Cooke, 124. — 10. Bonds, bills of exchange, and other personal securities, pledged or deposited with a creditor, may be directed to be sold before the commissioners in the same manner as an estate. Cooke, 123. — 11. A creditor having a mortgage or pledge, apprehensive that security is not equal to liquidation of debt, may have the pledge sold. This was done formerly by petition. See 7 Vin. 101. 9 Ves. 115. 11 Ves. 398. 403. But now the commissioners are directed by a General Order (Gen. Order, 8th Mar. 1794), to have the mortgage

mortgage sold before them, or by public auction; and they are to cause due notice to be given in the London Gazette, and in such other of the public papers as they may think fit, when and where the mortgaged premises are to be sold, and the proceeds of the sale are to be first applied to the payment of the expences of the sale, and then in payment of the mortgagee's principal, interest, and costs; and in case of a deficiency, the mortgagee is to prove for the residue under the commission. — 13. Order in bankruptcy on petition for sale of premises, subject to an equitable mortgage; the General Order (8th Mar. 1794) applying only to legal mortgages. 16 Ves. 434. — 14. The court will not, sitting in bankruptcy, on behalf of the sureties of a bankrupt, direct a sale of mortgaged premises, for payment of a debt secured by recognizance, or for payment of any other security, except a mortgage. 1 Ball & Beatty, 197. — 15. Where the grantor of an annuity secured by real property, becomes a bankrupt, and arrears of the annuity become due after the bankruptcy, the real security will, on the petition of the grantee, be ordered to be sold, and the produce applied in satisfaction of so much of the arrears and value of the annuity as the same will extend to satisfy, and the grantee be allowed to prove the residue under the commission. 1 Mad. 426. — 16. Bankrupt before his bankruptcy, on a loan of stock, gave a bond to re-transfer the principal within three years, and pay the amount of the dividends in the meantime, and also agreed to convey a real estate as a security. No re-transfer was made, nor any dividends made. Held, that on his bankruptcy, the security should be sold, the dividend paid out of the produce, and that stock should be purchased; and if not sufficient to re-purchase the whole principal stock, that proof should be made under the separate estate for the remainder; and that the assignees were not entitled to have three years to re-transfer the stock. 3 Mad. 159. — 17. In the sale of an office, the course of proceeding is, for the assignees to settle the price with a purchaser, and then to propose him to, and get the approval of, the person having the power of admission, whereupon the bankrupt must surrender the office, which the chancellor will compel him to do at the peril of imprisonment. 1 Atk. 210. Cooke, 283.

(N) Void Transactions.

1. Until an act of bankruptcy, the *jus disponendi* over goods remains with the trader, unless he exercise it by way of a voluntary and fraudulent preference of a particular creditor, in contemplation of bankruptcy. 5 East, 175. — 2. A transfer on the eve of a bankruptcy, is only fraudulent when it is a voluntary act moving from the debtor. Holt, 503. — 3. The preference of a particular creditor by a trader in bad circumstances is valid, if the trader did not contemplate bankruptcy at the time, though the creditor did not threaten arrest in case of refusal. 6 T. R. 152. — 4. Legal preference is, where the property is duly and regularly transferred, and the transfer complete before an act of bankruptcy; as where payment is made by a trader in the ordinary course of dealing, or enforced by legal process, though but the evening of the bankruptcy. Cowp. 117. Loft. 472. — 5. Where a trader, under a threat or apprehension of legal process, or from the pressure and importunity of his creditor, delivers property to him, or gives him a power to receive it; the transaction is valid, even though the trader knew himself to be insolvent. 1 T. R. 155, 156. 2 Bos. & Pull. 182. 5 Ves. 85. 1 Ves. jun. 280. 5 T. R. 235. 6 T. R. 152. 2 Camp. 166. 11 East, 256. — 6. A preference shewn to a particular creditor by a trader contemplating bankruptcy, if given under an apprehension, however groundless, of legal process, or on a demand for payment, is in the ordinary course of trade, and therefore valid. 1 T. R. 155, 156, n. — 7. The circumstance of a bond debt not being due, in satisfaction of which goods have been given, is not decisive of fraudulent preference. 2 B. & B. 582. — 8. A payment made previously to an act of bankruptcy to an obligee, who presces for payment, before the bond is forfeited, is good. 4 Esp. 60. — 9. A. discounts a bill for B., and before it comes due, has reason to suspect that the acceptance is forged. He takes two constables to an inn where B. is. Whilst they are in attendance below, he asks B. whether he is aware there is any irregularity in the bill. B. says, "I am; but the whole shall be paid." A. insists upon payment before B. left the room: on which B. proposes to assign him hops, &c. lying in a rented warehouse. There was evidence, that after the arrangement was acceded to, and before the bill of sale was executed, B. must have been aware that the constables were in attendance, as messages were sent up from them to know if they were wanted. The bill of sale was held good against a subsequent bankruptcy. Mann. Index. — 10. A trader, in contemplation of bankruptcy, sends his clerk to make a payment to a creditor; but before the clerk reaches the creditor's house, the creditor makes a personal demand of the debt. Held, that notwithstanding the intention to give a preference, the intermediate demand made the payment by the clerk valid. 1 Campb. 416.

— 11. If A., a shop-keeper, procure B. to discount accommodation bills drawn by him and accepted by third persons, and B. afterwards require A. to give him a collateral security for the payment of the bills; upon which A. secretly deposits with him a quantity of goods from his shop, to be sold for B.'s benefit, if the bills should not be paid; and soon after A. becomes bankrupt, and the bills are dishonoured. The depositing of the goods in this manner, as a security, cannot be invalidated as a voluntary preference in contemplation of bankruptcy. 11 East, 166. — 12. Defendant having discounted bills for B., required a collateral security, upon which B., at different times, brought goods to defendant in the evening, to be sold to cover the bills, if dishonoured. B. shortly became bankrupt. Held, that the depositing of these goods at the urgency of the defendant, was not a voluntary preference, though there was no immediate right of action. 2 Campb. 166. — 13. Holder of note gave it up on receiving an order to pay out of purchase-money. It was not accepted, but purchaser verbally agreed to give notice to attend when the deeds and money were ready. He did attend accordingly; but before the business was over, drawer was arrested, and soon after a bankrupt; holder had a lien; the order not being given in contemplation of bankruptcy, though he knew drawer to be insolvent at the time. 1 Ves. 280. — 14. Security made by a debtor insolvent, his effects under execution, and not two months before bankruptcy, upon a previous application of a creditor ignorant of those circumstances: the lord chancellor thought it valid, but permitted the assignees to bring an action. 3 Ves. 85. — 15. J. R. before her bankruptcy, being pressed to discharge a debt, and giving to her creditor a draft on the executor of a debtor of her's, which draft the executor promised to discharge, on receiving assets, is a good equitable assignment of the debt, and available against the assignees of J. R. 1 Mad. 53. — 16. Property delivered by a trader to a creditor, in contemplation of bankruptcy, and in order to give such creditor an undue preference, is fraudulent and void. 4 Burr. 2171. 4 Burr. 2235. 1 Blk. 660. — 17. Preference in contemplation of bankruptcy, however moral the act, void. 18 Ves. 342. — 18. Delivery of effects in contemplation of bankruptcy to a creditor, though standing perfectly *bona fide*, is bad, if voluntary and without pressure. 3 Ves. 85. — 19. An assignment of part of a trader's effects in contemplation of bankruptcy, is fraudulent. 3 Wils. 57. — 20. A pretended sale, though of part only of a trader's goods, to a particular creditor; or any other contrivance not in the course of trade, but calculated merely to give a fraudulent preference, and to defeat the equality of the bankrupt laws, is void; though the delivery of the goods to such creditor, and his assent to the transaction, be complete, before any act of bankruptcy committed. But such pretended sale is not in itself an act of bankruptcy; nor is any other fraudulent transaction without deed. Cowp. 629. — 21. A transaction void as against creditors, but valid against debtor himself, is not available by the assignees under the subsequent bankruptcy of the debtor, not contemplated at the time. 5 Taunt. 109. 663. — 22. Legal title in contemplation of bankruptcy protected by the previous equitable title. 13 Ves. 122. — 23. Semble, that if a trader, by delivering over property, in order to evade a threat of process, gains nothing, the preference must be presumed voluntary. 7 East, 544. — 24. Whether a trader, who on the verge of insolvency, delivers goods to a creditor, does it in contemplation of bankruptcy, is a question of fact for the jury, though he afterwards became a bankrupt. 5 Taunt. 539. 1 Mars. 196. — 25. A fraudulent purchase of goods from a person in insolvent circumstances, by a creditor, with knowledge thereof, to save himself and cheat the other creditors, of whom the insolvent bought such goods upon credit, is void. 4 Burr. 2477. — 26. A trader, in contemplation of absconding, incloses certain bills to A., a particular creditor, in discharge of his debt, saying, he has the honour to shew him that preference which he conceives is his due: this is done without the privy of A., and followed by an act of bankruptcy before the notes could possibly be delivered. The essential motive being to give a preference, and the act itself complete, the transaction is void. Cowp. 117. — 27. A trader in insolvent circumstances, and under arrest in execution at the suit of a creditor, assigns all his goods and effects to him in payment of his debt, with a trust for payment of the surplus to himself. Held, this is in contemplation of bankruptcy, and fraudulent, within 1 Jac. 1. c. 15. s. 2. notwithstanding the compulsion of the arrest. 3 Smith, 137. 7 East, 138. — 28. Where a trader, knowing himself to be insolvent, called upon his creditor and informed him of it; and the creditor thereupon said, that he must be paid his debt, which was done, and the trader immediately afterwards became bankrupt. Held a fraudulent preference. 2 B. & P. 283. — 29. The acceptor of a bill informed the holder, before it became due, that he was insolvent; the holder promised, if the bill was regularly paid, he would guarantee a composition to the creditors: the bill was paid, the acceptor became bankrupt. Held a fraudulent preference. 3 Esp. 215. — 30. If the consignee

of goods upon credit, suspecting his solvency, refuse them, and consignor upon notification consents to receive them back (which consent will be presumed) they will not pass. 1 Str. 165.—31. The rule, that a trader on becoming insolvent may rescind a contract in favour of a particular creditor, is limited to cases where the contract is not complete; therefore he cannot rescind a contract of sale where goods have been delivered, and a bill has been accepted by him for the amount. 6 T. R. 80.—32. A. purchases goods of B. on October the 8th, for the purpose of exportation, but finding that he must stop payment, and that he cannot apply the goods to the purpose for which they were bought, he returns them to B. on October 16th: on 17th he stops payment, but expecting remittances from abroad more than sufficient to pay his debts, has no doubt but his creditors will give him time; they, however, refusing, he is made bankrupt on November 2d. In an action by the assignees against B. for the value of the goods; held, that the jury were warranted in finding that the delivery of the goods to B. was not made in contemplation of bankruptcy. 1 Mars. 196. 5 Taunt. 539.—33. Goods ordered and actually received were soon afterwards sent back, to give a preference, in contemplation of bankruptcy. The assignees are entitled to them. 2 East, 117.—34. If A. deliver goods to B. upon a contract of sale, the property is changed by the delivery, though the goods were obtained by B. with intent to defraud A.; therefore the latter cannot take them back after an act of bankruptcy. 4 Esp. 171.—35. A., an insolvent trader, receives a remittance from B., a creditor abroad, which he delivers to B.'s agent, C.: his other creditors afterwards meet, and consent that the bills remitted shall be delivered to C. to hold for the parties ultimately entitled. This is a valid delivery to B., and the transaction is not affected by the subsequent bankruptcy of A. 1 Camp. 89.—36. Where a trader, before his bankruptcy, deposited a lease as a security for money, without making any mortgage or assignment of it, the legal estate vested in the assignees under the commission. 5 Esp. 105.—37. If, before an act of bankruptcy, a trader place goods in the hands of a factor for sale, the latter may sell after the bankruptcy, and may retain the proceeds to answer his own debt. 4 Esp. 233.—38. A. ships goods for Hamburgh, and makes out the bills of lading in the name of S. & M. who have no interest in the property, and deposits these bills of lading with B. as a collateral security for his acceptance of A.'s drafts. B. pays his acceptances, and A. becomes bankrupt: B. has a legal claim to the proceeds of the cargo. 1 Camp. 554.—39. A trader gives a power of attorney, for the purpose of enabling a creditor to receive money for his own reimbursement. Money received under this power, after an act of bankruptcy, cannot be retained against the assignees. 5 Esp. 158. *Quere.*—40. Unless an execution is actually executed, not merely delivered to the sheriff, the bankrupt's goods pass. 3 Lev. 69. 191. 1 Lev. 173.—41. Bankruptcy after seizure, will not invalidate the execution. *Ld. Raym.* 724.—42. Lands cannot be assigned if a statute be extended upon them though the *liberate* was not sued before the bankruptcy. *Cooke*, 373.—43. When a tenant in tail makes a mortgage for years, and afterwards becomes bankrupt, and dies, without suffering a recovery, the assignees shall hold free of the mortgage. 1 Wils. 276.—44. Where A. made a mortgage, and afterwards a commission was taken out against him, and the commissioners made an assignment of his estate; and then B. lent 2,000*l.* to the bankrupt upon a second mortgage, without notice of the bankruptcy, and afterwards B. got in the first mortgage; this mortgage was held not to protect the other. 2 Vern. 157; but judgment reversed, *Journals Dom. Proc.* 14 vol. 601.—45. By stat. 1 Jac. 1. c. 15. s. 5. if trader transfer manors, lands, tenements, hereditaments, offices, fees, annuities, leases, goods, chattels, or his debts, into other men's names, except the same should be purchased, conveyed, or transferred for or upon the marriage of any of his children, both the parties married being of the years of consent, or some valuable consideration, the commissioners may assign them.—46. The expressing that the consideration is for other valuable considerations, besides that expressed, merely allows of proof to that effect. 1 Atk. 93.—47. Voluntary conveyance by a solvent trader is unavailable. 1 Atk. 93. 1 Bro. 160. 8 Ves. 200.—48. A voluntary conveyance by one not in trade, with the view of protection against possible bankruptcy in a trade in which he is about to engage, seems unavailable. 1 Mont. 465.—49. Half of a lease, bequeathed to bankrupt's child under agreement, upon loan by bankrupt of half the fine of its renewal, either so to bequeath or repay the money, is distributable. 1 Bro. 160. 7 Ves. 88.—50. It seems that the wife of a trader is within the statute. 1 Mont. 466.—51. Voluntary conveyance of trader's property, for the use of himself and his wife, is distributable. *Styles*, 288.—52. Settlement upon marriage by husband, neither indebted, in trade, or intending it, upon himself until his death or bankruptcy, then for payment of annuity to his wife, is unavailable. Nor is a covenant by the wife's father to do some act, any consideration within the statute. 19 Ves. 90.—53. Purchase by a man in the joint names of himself and his wife, if he was a trader at the time, and he afterwards becomes

becomes bankrupt, is void against the creditors, within the statute 1 Jac. 1. c. 15. s. 5. So, if the purchase was made with the wife's money, if previously received and disposable by him as his own; not bound by any agreement with a trustee; and the receipt not connected with the purchase. 8 Ves. 195. 9 Ves. 12. 11 Ves. 377.—54. A tenant for life, with remainder to his children, redeems the land-tax on the estate with his own money, introducing into the contract for redemption his own name, and that of another, as trustees for his children; and afterwards becomes bankrupt. On bill by his assignees against a purchaser of his life estate, and of the land-tax so redeemed, a specific performance decreed, as being within the statute 1 Jac. 1. c. 15. s. 5. 3 Mer. 702.—55. Where a conveyance was made by an administrator, who afterwards became a bankrupt, to his children, the grandchildren of the intestate, for the payment of 1,500*l.* each, given to them by him; held fraudulent against creditors, unless it could be proved that he had assets in his hands of intestate, at time of conveyance. 1 Mad. 76.—56. If a settlement is made before marriage, though without a portion, it will be good against the assignees; for marriage itself is a consideration, and it is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional sum of money, or even an agreement to pay money, if the money be afterwards paid, pursuant to the agreement. Cooke, 262.—57. A covenant to indemnify the husband against the wife's debts, is a sufficient valuable consideration within the statute of James, even though the husband lives apart from his wife, and a separate maintenance is provided for her. 3 Mer. 269.—58. A father, at the request of his son, executes a mortgage to secure a debt due from the son to the mortgagee. Held, that the mortgage is not a voluntary conveyance without consideration, within 1 Jac. 1. c. 15. s. 5. 1 Buck, 165.—59. Money is not within stat. 1 Jac. 1. c. 15. s. 5. 7 Ves. 88. 1 Rose, 210. 2 M. & S. 36. accord.; Amb. 596, contra.—60. If a person make a voluntary conveyance, upon consideration of natural affection, and he is not at the time indebted to any one, nor in treaty for the sale of the lands, such conveyance has no badge of fraud. Secus, if then indebted, or then in treaty. Style, 446.—61. A voluntary fair conveyance by one not in trade, nor indebted, is not avoided by subsequent bankruptcy. Cro. Car. 548. 2 P. Wms. 298. 1 Atk. 93. 8 Ves. 195.—62. Hence, where a man not a trader, and not indebted, purchased lands, and settled them to himself, and to his wife and son, and two years afterwards entered into trade and became bankrupt; the settlement was held good against creditors. Cro. Car. 548. 3 P. Wms. 298.—63. Equitable settlement by trader, after marriage, upon his wife, of her property, in possession of her trustees, and never in his own or his order, is valid. 1 Mont. 467.—64. A deed made by a trader two months before an act of bankruptcy was committed, for securing the fortunes of children out of trust monies in his hands, was declared good against creditors. 10 Mad. 490.—65. An insolvent trader, having, as administrator to his wife's father, received a legacy to his own children, may settle it upon them, if at the time he have goods of testator in his possession. 1 Mad. 76.—66. By 5 Geo. 2. c. 30. s. 11. every bond, bill, note, contract, agreement, or other security whatsoever, made or given by any bankrupt, or by any other person, unto or to the use of or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt and such bankrupt's discharge, as a consideration, or to the intent to persuade him, her or them, to consent to or sign any allowance or certificate, is void: and the monies thereby secured, or agreed to be paid, are not recoverable; and the party to such contract may plead the general issue, and give the special matter in evidence.—67. An agreement to pay a sum of money to the assignees of a bankrupt when his certificate shall be allowed, whereby a creditor is induced to sign (although the money to be paid is for the benefit of all the creditors) is void by 5 Geo. 2. c. 30. s. 11. Dougl. 659, n.—68. And an action lies to recover back money paid to a creditor to induce him to sign the certificate. Dougl. 696. 2 T. R. 766. 1 P. Wms. 620. See 6 T. R. 146. 4 East, 372. 15 Ves. 52.—69. A bond given to a creditor to induce him not to petition against the allowance of a bankrupt's certificate, is void. 1 H. B. 647. Contradicting 1 P. Wms. 620. And see 3 Taunt. 478.—70. An assignment in consideration of not prosecuting a docket struck, is not valid. 2 Mad. 40.—71. An agreement by a third person with the assignees of a bankrupt, to pay them the full amount of certain sums, with the receipt of, and not accounting for which, the bankrupt was charged, in consideration that the bankrupt should not be examined by the commissioners touching those sums, is void; because, 1. The assignees have not power over what they have undertaken for, and so there is no consideration; 2. The agreement contravenes the policy of the bankrupt law. *Quære*, whether a consent by the creditors would have altered the case? *semble*, not. 3 T. R. 17.—72. A contract to make a debt not enforceable
“till”

"till death or bankruptcy," is not good. 1 Sch. & Lef. 46. — 73. Guaranteeing to a creditor a certain dividend, if he will sue out a commission of bankruptcy, is legal, in the absence of fraud and concert. 5 Taunt. 117. — 74. The sole object of the bankrupt law, is to have an equal distribution of the bankrupt's effects amongst his creditors; any contract, therefore, not tending to defeat this object, does not contravene the policy of those laws; hence, a covenant by a third person, to pay all the creditors of a bankrupt their full demands if they would not proceed with the commission, is valid. 6 T. R. 134. — 75. Bond for a debt discharged by certificate, in consideration of a loan, or becoming security, is valid. 1 Atk. 256. — 76. A trader having purchased goods on credit, and fraudulently resold them for ready money, under their value; an action for goods sold and delivered, cannot be maintained by his assignees against the purchaser, to recover the difference between the sums paid and the value of the goods. 4 Camp. 355. — 77. If a trader sell goods far below their value, neither he nor his assignees can recover the difference. 1 Stark. 241. — 78. If an uncertificated bankrupt sell to A. a vessel, of which he is the ostensible owner, A. has a good title against all persons but the assignees. Peake, 149. — 79. Lease determinable upon bankruptcy, is good. 15 Ves. 268. — 80. A person who is merely the instrument or channel by which an unauthorized payment is made by or to the bankrupt, is not amenable. 4 Taunt. 198. — 81. A. draws on C. in favour of B.; C. accepts, in expectation of goods of A., which do not come to his hands till after A. has committed an act of bankruptcy. This is not such a receiving by B., of the proceeds of the goods, as will subject him to an action for money had and received, at the suit of A.'s assignees. 1 Stark. 481. — 82. A sheriff, without notice of the bankruptcy, paying over the proceeds of an execution, is protected. And in all cases, when acting fairly, will be favoured by the court. 1 Blk. 205. 2 T. R. 121. — 83. The riding clerk of a creditor having sold goods delivered to him by the bankrupt for, and having sold and accounted to, his master, is liable to the assignees. Sayer's Rep. 40. — 84. Assignees cannot consider the same transaction as partly valid, partly void. 2 Str. 859.

(O) *Wife and children.*

1. With respect to the assignees interest in the wife's property, it is the same with the husband's. Whatever, therefore, or to whatever extent he might have assigned or released it, they may claim. Vide *infra*. — 2. If, however, the assistance of a court of equity is necessary to enable them to possess themselves, it will only be extended upon the condition of their making a competent settlement upon the wife, unless already provided for. Davies, 281. 2 Vern. 662. 1 P. Wms. 382. 458. 1 Atk. 190. 192. 280. 2 Atk. 417. Cited 1 P. Wms. 459. 4 Bro. 139. Cited 1 P. Wms. 458. 1 Bro. 44. 2 Ves. jun. 607. 680. 3 Ves. 166. 421. 617. 5 Ves. 517. — 3. It has been considered doubtful, whether a court of equity will interfere to assist a wife, if the husband or his assignees can get possession of the wife's property without the aid of the court. But the court of chancery has repeatedly granted injunctions, to stay proceedings in the ecclesiastical court for the recovery of a legacy to the wife, until a proper settlement has been made. Bunb. 80. Prec. in Ch. 548. 1 Stra. 238. 503. 2 P. Wms. 638. 3 P. Wms. 10. 2 Atk. 419. Whitm. — 4. Whence, if the bankrupt would be considered as a trustee for his wife, so will his assignees, 2 Atk. 557. 2 P. Wms. 316. — 5. The fortune of the wife may be settled upon the husband until his bankruptcy, and then to her separate use, or to the use of the children of the marriage; and if any part of her fortune has been lent to her husband, the debt may be proved under a commission against him. 2 Stra. 947. Co. Bt. Laws, 215. 2 Bro. 490. 8 Ves. 353. 14 Ves. 598. — 6. By articles before marriage, 4000*l.* was settled to the use of the bankrupt for life, but if he failed, the trustees were not to pay the produce to him, but apply it to the separate maintenance of the wife and children. The settlement was held good against the assignees, it not being a provision out of the bankrupt's estate, but the settlement of her own fortune. 2 Stra. 946. — 7. Though a bond by a husband to pay a sum, in the event of his bankruptcy or insolvency, to trustees, for the purpose of settlement, cannot stand against the creditors, the property of the wife may be limited to the husband, until he becomes bankrupt, &c., and from that event, for his wife and children; and where, in articles for such a settlement, the husband covenanted to give a bond for 5,000*l.* upon the same trusts, and had received all her fortune without making any settlement, proof was admitted under his bankruptcy, not only for the amount of her property agreed to be settled, but the 5,000*l.*, or so much as the value of the property of the wife would extend to beyond the sum agreed to be settled. 8 Ves. 353. — 8. Assignees under a commission of bankruptcy, are in the place of the bankrupt with reference to the equitable interest of his wife. 11 Ves. 17. — 9. Assignees of a bankrupt are entitled to the equitable interest for the life of his wife, as well as a capital sum, subject to the equity requiring
a pro-

vision for her out of it. 11 Ves. 21. — 10. Assignees of a bankrupt claiming property in right of his wife, must make provision for her. 5 Ves. 517. — 11. Assignees of a bankrupt, defendants in respect of an interest in his wife, cannot take it without making a provision for her. 3 Ves. 421. — 12. Assignees of a bankrupt must make a provision for his wife out of all her property, which can be obtained in equity only; and a settlement before marriage, of part of her property, to her separate use, does not bar her. 2 Ves. 607. — 13. Assignees of bankrupt taking his wife's fortune out of the court, must make a provision for her. They consented to give her half. 3 Ves. 167. — 14. Equity of a bankrupt's wife against the assignees of her husband, or their vendee, for a settlement of her choses in action. 3 Mer. 574. — 15. A feme covert entitled to a contingent legacy; the husband becomes bankrupt; the court will not order payment before the assignees and the bankrupt have each laid proposals for a settlement before the master. Dick, 647. — 16. Devise to the use of A. and her issue in strict settlement, subject to a trust for debts and legacies, and to pay annuities out of rents and profits, with power to sell. Upon the bill of creditors and legatees, one of the annuitants being living, the assignees of A.'s husband, a bankrupt, being defendants, were decreed to make proposals for a provision for the wife. 2 Ves. 680. — 17. And where the wife of a bankrupt is entitled to trust property, the assignees of her husband are bound by the same equity, and cannot obtain the property in a court of equity without making a provision for the wife. — 18. If the assignees claim during the wife's life, provision will be ordered for the children. 2 Atk. 417. 2 Atk. 695. 1 P. Wms. 459. — 19. But not, it seems, if after her death. 3 Atk. 695. Amb. 509. — 20. If the property of the wife be not more than sufficient to maintain her, as in the case of an annuity; the court has ordered her to receive the whole for her separate use. 1 Atk. 192. More fully stated, Co. Bt. Laws, 265. 2 Ves. jun. 680. — 21. But if the property be sufficient to allow her a sufficient maintenance, and to apportion part of it to the assignees of the bankrupt, the court generally leaves it to the liberality of the creditors, or refers it to a master to settle what is a proper maintenance. — 22. On a bill filed by the assignees of a bankrupt to recover money to which the bankrupt was entitled in right of his wife, the usual reference was made to consider proposals for a settlement on the wife and children. The master having approved a settlement of the whole property on the wife and children, exceptions were taken to his report, and allowed, and he directed to review it. 1 Mad. 362. — 23. Property given to a wife for her sole and separate use, does not pass. 2 Vern. 96. 2 P. Wms. 316. 2 Atk. 557. 3 Atk. 695. 7 Vin. 95. pl. 14. — 24. The property of a feme covert, sole trader, according to the custom of London, does not pass. 3 Burr. 1776. — 25. The necessary apparel of the wife and her children does not pass. 5 Geo. 2. c. 30. s. 1. — 26. If the wife be entitled to dower, the commissioners' assignment will not affect it. Good. 90. Stone, 163. — 27. A vested legacy to which the wife is entitled, but not reduced into possession by the husband in his life-time, survives to the wife, although the husband becomes a bankrupt. 2 Dick. 491.; and cited 1 Bro. 50.; so Co. Bt. Laws, 291. — 28. The general assignment in bankruptcy has not the effect of reducing into possession, a legacy of stock in trust for the bankrupt's wife; whose right by survivorship was established against the assignees. 9 Ves. 87. — 29. Feme sole mortgagee in fee married; her husband became a bankrupt, and died; assignees entitled to the mortgage. 1 P. Wms. 458. — 30. A chose in action due to the wife, passes; but the assignees must make a provision for the wife. 1 Vern. 7. 18. 2 Vern. 270. Prec. in Ch. 412. 1 E. C. A. 58. 2 Atk. 207. 417. 1 P. Wms. 249. 458. 3 Ves. 618. supra. — 31. Hence, debts due to a wife *dum sola*, pass. 1 P. Wms. 248. — 32. Where a chose in action was not actually reduced into possession by the husband, or his assignees, during his life, the bankruptcy and assignment seem to have been considered as such a reducing into possession as was sufficient to bar the wife's contingency of survivorship. 1 P. Wms. 255. 3 Ves. 619. Vide supra (i). — 33. If the wife upon her marriage be possessed of stock in the public funds, it passes. 3 Ves. 617. — 34. Bond upon marriage to pay a sum of money to the husband; which upon contingencies to be determined upon his death, was declared to be subject to the trusts of the settlement for his wife and children. Upon his bankruptcy payment was decreed to the assignees. 5 Ves. 695. — 35. Upon the marriage of the bankrupt in 1802, the estate of the wife, consisting of freehold, copyhold, and leasehold lands, were conveyed to the use of the bankrupt and his heirs, who covenanted with the trustees, within six months after the marriage, to pay to them 4,000*l.* upon the trusts of the settlement. The trustees never demanded payment. In 1806, the bankrupt sold part of the freehold premises, and he and his wife levied a fine of the whole, declaring the uses of that part which was sold, to the purchaser, but without making any declaration as to the remainder. In 1812 the bankrupt conveyed all his estates to trustees, for the benefit of his creditors. In 1813 the bankrupt covenanted that he and his wife would levy a fine to the uses declared in the deed of 1812, and a fine was levied accordingly.

The wife never surrendered the copyhold premises, pursuant to the settlement of 1802. In 1814 the commission issued, and the husband was declared a bankrupt; his execution of the trust deed of 1812 being the act of bankruptcy. The trustees of the settlement proved the 4,000*l.* under the commission, and signed the bankrupt's certificate. Held, that the trustees on behalf of the wife and children of the bankrupt, had a lien upon the estates thereby conveyed, and remaining unsold by the bankrupt, to the amount of the 4,000*l.* 1 Buck. 115. — 36. Trustees in the plaintiff's marriage settlement, lent part of the trust monies in their hands to the husband, when in full trade and in credit, upon his bond. He purchases an estate, and took the conveyance to himself in fee simple. He afterwards became bankrupt, and the estate so purchased, with other effects, were conveyed and assigned to his assignees. The estate so purchased was held to be purchased with the trust money, and ordered to be conveyed to the new trustees upon the trusts in the settlement, in part of the bond debt, and the trustees to prove the remainder of the debt under the commission. Dick. 593. — 37. If a trader, previous to his marriage, covenant to settle specific lands upon his wife, and the trader become a bankrupt, and die without performing the covenant, the court will compel the assignees of the husband to carry the settlement into execution. 2 Eq. Ca. Ab. 102. — 38. Covenant upon marriage, that the heirs, executors, &c. of the husband shall, within six months after his death, pay to the wife, if she should survive him, the fortune he received, with the addition of 50*l.* per cent.; and, in case he should receive any other part of her fortune, to which she was entitled in reversion under a will, to pay that in the same manner, and with the same profit. The husband becoming bankrupt, the wife has no claim upon that reversionary fund, against a purchaser under the commission. 14 Vcs. 313. — 39. Devise of copyhold estates to the wife of A., to be disposed of as she should appoint; and a bequest of 200 guineas to pay the fines of her admission, the surplus to herself. She is not admitted, but appoints to her husband, who is the residuary legatee, and gives her credit for the 200 guineas in account. He becomes bankrupt. Held, that the 200 guineas, not having been applied for the purpose of admission, fell into the residue; and that the credit in account was a mere declaration of trust without consideration, and not binding upon his creditors. 1 Rose, 208. — 40. In questions whether the wife of a bankrupt, or her trustees, shall be admitted to prove money settled by marriage articles under a commission against the husband, the courts have had occasion to consider, whether the debt was, in its nature, contingent at the time of the bankruptcy. If the debt was, from its nature, contingent and uncertain, and the contingency had not taken place at the time of the bankruptcy, the courts have held, that it could not be proved under a commission. Therefore, where a husband, by articles previous to marriage, covenanted, in consideration of marriage and a portion, to leave his wife a sum of money in case she survived him, and he became a bankrupt, such debt could not be proved under the commission. 1 Atk. 114. — 41. If a trader covenant to pay to trustees, for the uses of his marriage settlement, the sum of 6,000*l.* by instalments, viz. 1,000*l.* at the end of seven years, and 1,000*l.* per annum afterwards, so that the sum of 6,000*l.* should be paid in twelve years, if the trader should so long live; if he should not, then the whole to be paid within one year after his decease, if the wife or any child of the marriage should be then living; if not, then 3,000*l.* only to be paid, and the trader becomes a bankrupt before the end of the first seven years; at all events the 3,000*l.* payable at his death, is proveable under the commission. 1 Bro. 398. — 42. And where one Blanchard married the sister of Calliford, who had 500*l.* secured by land; and Blanchard, on his marriage, gave a bond to leave his intended wife, if she survived him, 500*l.*, or a third of his estate, at her election, and Blanchard became a bankrupt. Upon a bill filed by the assignees to have the 500*l.* raised by a sale, it was decreed accordingly; but with this, that the wife should come in as a creditor, upon the 500*l.* bond; and what should be paid in respect thereof, to be placed out at interest, and received by the creditors during the life of the husband; and if the wife survived, then the money to be paid to her; and if she died in the lifetime of the bankrupt, then the money to be paid to the assignees; but inasmuch as the case appeared to be somewhat hard on the wife, the lord chancellor recommended the assignees to make a reasonable agreement with her. 2 Vern. 166. — 43. Proof by the widow of a bankrupt, under an engagement by the marriage settlement to settle money; which he falsely represented himself to possess. 11 Vcs. 40. — 44. Settlement, previous to marriage, of money, the property of the wife, upon the event of the husband's bankruptcy, valid; and part being lent to the husband, upon his bond, under a power for that purpose, was proved under the commission. 14 Vcs. 598. — 45. Proof in bankruptcy, under a covenant by the bankrupt in consideration of marriage, immediately after the marriage, or whenever afterwards requested by the trustees, to transfer 2,000*l.* stock, alleged to be standing in his name, though not the fact; but the specific time of the request must

must be ascertained. 16 Ves. 244. — 46. On marriage of W. W., then in good circumstances, he gave a bond to trustees for 4,000*l.*, conditioned for payment of 2,000*l.* within one month after demand; and for payment to them, in the meantime, of interest upon the 2,000*l.* by half-yearly payments, upon such trusts as were contained in an indenture of settlement. By the settlement, it was provided, that the trustees should not call in, or demand payment of the 2,000*l.*, or any part thereof, during the life of W. W. The interest of this 2000*l.* was several years in arrear. W. W. afterwards became bankrupt, never having consented to a demand upon him for the 2000*l.* Held, that the 2000*l.* was proveable against the separate estate of W. W. 2 Mad. 282. — 47. In cases where the contingency, the death of the husband, has taken place after the bankruptcy, but before any distribution made of his estate, the wife or her trustees are not entitled to a dividend; but the court has generally, from the hardship of the case, recommended the creditors to make some provision for the wife; which has been in general attended to. 1 Atk. 113. 118. 120. — 48. If a bond be given by a trader, upon his marriage, to trustees, to be forfeited upon the contingency of his becoming insolvent or a bankrupt; such bond cannot be proved under a commission against him. Cox, 300. Cooke, 228. Co. Bt. Laws, 228. 8 Ves. 353. 1 Sch. & Lef. 46. — 49. And where a trader covenanted in marriage articles, to pay trustees 4,000*l.* in case she should die leaving a son and other children who should arrive at twenty-one; and he became a bankrupt, and had a son and four other children; the lord chancellor refused to permit the trustees to prove, as it was a contingency which might never happen. 7 Vin. 72. pl. 7. — 50. And so where a bond was given, depending upon the contingency of the wife surviving the husband. 2 P. Wms. 497. Whitm. Or payable within three months after the decease of the survivor of two obligors who became bankrupt. 9 Ves. 110. — 51. And where a bond was given to trustees, payable within two months after the death of the obligor, if he married his then intended wife, and she survived him. Ld. Ray. 1546, and Stra. 867. — 52. And again, where a father covenanted in case his daughter and intended son-in-law should have issue living at the time of his death, to pay 1,000*l.* to the son, if living, but if he should die before, then to trustees for the daughter for life, and then for the children, and in default to the son's own executors; and the son upon his part covenanted, that if he received the money upon the father's death, his executors should in three months after his death pay the same to the trustees, to the like uses; and the son received the money and became bankrupt; Lord Harwicke refused to permit proof of the debt. Davies, 254, and see 5 Ves. 695. — 53. A bond is given by a trader, previous to his marriage, to a trustee; and by marriage settlement of the same date, it is covenanted that the sum mentioned in the bond is to be payable only in the event of the wife surviving the husband; and it also covenanted that in case the husband failing in his circumstances, but not otherwise, the trustees shall sue on the bond. The husband becomes bankrupt living the wife. The trustee ought not to be admitted a creditor. 1 Sch. & Lef. 44. But the wife's own fortune may be thus settled, Id. 47. — 54. Covenant in marriage articles, that in case the wife should survive the husband, or he should leave any issue by her, his heirs, executors and administrators, should raise 500*l.* &c. Held, upon a petition by the trustees, to be admitted as creditors under a commission of bankruptcy against the husband, that the debt was contingent and not proveable, though a warrant of attorney to confess judgment had been granted previous to the bankruptcy, and judgment entered up. 1 Eden, 174. — 55. If in a marriage settlement the bankruptcy of the husband be made the event upon which the sum agreed to be settled by him shall become payable to the trustees, the proof of the trustees under his commission will be limited to the amount of the wife's fortune which he has received. 1 Buck, 179. — 56. Agreement on marriage by the husband as speedily as may be to settle 40*l.* a year upon his wife, to be paid from his decease; a sum of money to be invested in stock for the purpose of raising that annual sum; the dividends for the husband for life; the capital for the issue, &c. Under the husband's bankruptcy, proof allowed by the wife and children for 800*l.* amounting to a covenant to pay that sum upon the marriage, and upon the principle of arrears of an annuity due before the bankruptcy. 10 Ves. 349. — 57. A trader, on his marriage, receives 600*l.* his wife's fortune, and gives a bond for 1,000*l.* to a trustee, the interest payable to himself for life, if he shall continue solvent, but in case of his death or insolvency, the interest to his wife for her life, and the principal among the children of the marriage. On his bankruptcy, the claim of the trustee to be admitted a creditor on behalf of the wife, for interest, allowed as far as the 600*l.*, but not for the remaining 400*l.* 1 Sch. & Lef. 179. — 58. By a settlement previous to a marriage, there was a covenant by husband, that his executors should pay 3,000*l.* to trustees, six months after his decease, and that if he should become a bankrupt, that sum should be proveable under his commission. By a settlement made by

the wife, of her property, before the marriage, contingent interests were given to the husband. The husband became bankrupt, and on a petition by the trustees to be allowed to prove the £3,000l. under his commission, it was held, they could only prove to the amount of what the husband's contingent interest in the wife's property sold for under his bankruptcy. 5 *Mad.* 124. — 59. Proof for the earnings of a child, see 5 *Ves.* sen. 675. — 60. In all cases, whether the sum permitted to be proved is the property of the wife or the husband originally, and the husband is entitled to the interest for life, or to a subsequent contingent interest, the court will order the fund, produced by the dividend, to be secured; and if the husband is entitled to the interest for his life, the assignees will be permitted to receive it, and the principal must await any future contingency; and when that contingency takes place, it will either be distributed amongst the creditors of the bankrupt, or be applied to the purposes of the trust, as the circumstances of the case may be. 2 *Vern.* 662. 1 *Atk.* 117. *Co. Bt. Laws*, 212. 1 *Bro.* 598. 2 *Bro.* 489. — 61. A court of equity will supply legal defects in marriage articles executed by a trader, and compel assignees to carry the articles into execution. 2 *P. Wms.* 316. 1 *Atk.* 188. 2 *Eq. Ca. Ab.* 102. 1 *P. Wms.* 459. 2 *Atk.* 558. — 62. And where a settlement of lands by lease and release is made after marriage, but for a valuable consideration, and the lease for a year be lost, the settlement will be good against the assignees of the husband, as the release will amount to a covenant to stand seised. 1 *Atk.* 187. — 63. Where the settlement of a trader does not secure the wife's fortune in the event of his bankruptcy, the intention appearing to be so, it will be amended accordingly. 1 *Ball and Beatty*, 252. — 64. When the commissioners may examine the bankrupt's wife. *Stat.* 21 *Jac.* 1, c. 19, s. 5. — 65. Bankrupt's wife was admitted to prove that a payment was made, in contemplation of bankruptcy. 1 *Esp.* 66. — 66. It is stated, that the witness was considered to stand indifferent with respect to her husband's allowance; but unless the estate paid 20s. in the pound, the defendants, the favoured creditors, would not reduce the fund by their proof, in the same proportion that a recovery against them would increase it. *Manning's N. P. index.* — 67. If a woman be indebted, and she marries, her debts by the marriage become the debts of her husband, and may be proved under a commission of bankruptcy against him. 1 *P. Wms.* 249.

(P) *Surplus.*

1. Commissioners, upon the lawful request of a bankrupt, are required to make a true declaration to him of the manner in which his estate has been applied and disposed; and, if there is any overplus, the commissioners must make payment of the same to him, his executors, administrators, and assigns. And a bankrupt, after the full satisfaction of his creditors, may recover and receive the residue and remainder of the debts owing to him. 15 *Eliz.* c. 7, s. 4. 1 *Jac.* 1, c. 15, s. 15. — 2. In case of a surplus coming to a bankrupt, creditors have a right to interest wherever there is a contract for it, appearing either on the face of the security, or by evidence. 2 *Ves. jun.* 295.; and see 11 *Ves.* 654. and 14 *Ves.* 573. 1 *Ves. jun.* 170. — 3. Hence, the bankrupt is not entitled to any surplus until interest upon all bonds, contracts, or notes carrying interest, or interest allowed by the course of dealing, is first paid out of his estate. 1 *Atk.* 75, 244. 3 *Bro.* 456, 504. 2 *Ves. jun.* 295. — 4. Lord Thurlow thought, that the commissioners may make this computation of interest, without an order of the court. 1 *Ves.* 132. — 5. So, where by the course of trading and settling accounts, interest was allowed after a certain credit 5 *Bro.* 436. — 6. And interest has been allowed to be proved on the bankrupt's notes to bankers, not reserving interest, there being a surplus of the bankrupt's estate, and it appearing to be the custom of bankers to charge interest upon such notes. 5 *Bro.* 504. — 7. Upon a bankruptcy, there being a surplus, after dividing to the amount of the whole principal with interest to the suing out the commission, subsequent interest ordered on petition of bond creditors, saving just allowances; and commissioners might give it without order, and need stop at nothing but want of assets; but no compound interest allowed. 1 *Ves.* 132. — 8. Where debts did not carry interest by the contract, the court made the bankrupt pay the contribution out of the surplus. 2 *Ves.* 502. — 9. Where there is a surplus of the bankrupt's estate, creditors are not entitled to interest upon debts, unless it has been provided for by contract, either expressed or implied; and upon bonds, not beyond the penalty. 1 *Rose*, 399. — 10. The rule, that on a written undertaking to pay money on a day certain, or on demand, interest shall run from the day, or demand, without a contract for it, not extended to the case of a surplus in bankruptcy. Interest, therefore, subsequent to the commission, confined to debts carrying interest by the contract. 1 *Ves. & Beam.* 342. —

11. Interest out of the surplus of a bankrupt banker's estate, refused upon his promissory notes payable on demand; as not being debts carrying interest, either by contract, or on the face of them. 1 Rose, 517. — 12. In the event of a surplus, creditors are not entitled to a computation of interest upon interest. Nor will such subsequent interest be allowed to diminish the bankrupt's allowance. 1 Ves. 152. 3 Bro. 79. 1 Atk. 75. — 13. In merchant's accounts, where there are regular accounts settled from time to time and interest debited, it is said that interest on interest is allowed to be proved, on the ground of an original contract; and the settling accounts in that way is evidence of an original contract. But interest upon interest is not allowed in the case of a mortgage. 3 Bro. 456. — 14. If, after payment of the debts, there is a surplus consisting of real and personal estate, the personal estate is first to be applied in payment of interest and debts carrying interest; and if that is deficient, the real estate must be resorted to. But if the bankrupt is dead, and there is real and personal estate more than sufficient to pay the debts with interest, the surplus real estate must be conveyed to his heir, if he died intestate, and his personal estate be divided amongst his next of kin. 1 Atk. 75.

(Q) *Messenger.*

1. The messenger, in bankruptcy, is to enter and seize, at his own hazard, the property of the bankrupt; but if he enters the house, and seizes the property of another, acting under authority, he cannot be turned out, but the party must take his remedy by law; and contemptuous language, or force, is a contempt of the great seal. 17 Ves. jun. 59. — 2. *Quere*, whether a messenger, having been in possession under a warrant, and abandoned, the warrant is not spent. 1 Rose, 2. 17 Ves. 59. — 3. No doubt of the jurisdiction in bankruptcy, to order assignees to pay a messenger's bill of fees. 1 Rose, 449. — 4. It is no objection to an application by a messenger, that the assignees may be directed to pay him his bill of fees, that he has neglected to make a demand upon them till after final dividend; they must be presumed to have known of his having such a claim, and ought not to have distributed the funds, without reserving sufficient to satisfy it. 1 Rose, 449. — 5. Obstructing a messenger in the execution of his warrant, is a contempt of the great seal. 1 Rose, 1. — 6. Contumacious obstruction of the messenger under a commission of bankruptcy, treated as a contempt; though acting under the authority of the commissioners given by statute, not under the lord chancellor's order in bankruptcy, as in the case of commitment, upon which the lord chancellor can do no more than grant the writ of *habeas corpus*, as holding the great seal, not by his authority in bankruptcy. 17 Ves. jun. 59. — 7. The owner's course, upon an illegal seizure of his goods by messenger, is an action at law, not a personal interference. 1 Atk. 156.

(R) *Reference to Master.*

1. On a reference of a matter in bankruptcy to the master, affidavits which might have been read at the hearing of the petition in court may be received in evidence by him. 1 Rose, 45. — 2. Exceptions filed to the master's report under a reference in bankruptcy, upon petition for liberty to except. 19 Ves. 256.

(S) *Issues.*

Practice, upon directing an issue to try bankruptcy. 2 Rose, 162.

(T) *Statutes.*

1. The bankrupt statutes make but one system; are to be taken together; are to be construed favourably for the benefit of creditors, and to suppress fraud, and with humanity towards the bankrupt. 1 Burr. 474. 2 Blk. Com. 471, 2. — 2. An act of parliament relates to the first day on which the parliament is holden, unless otherwise provided for by the act itself. The st. 1 Jac. 1. c. 15. intituled, "An act for the better relief of creditors against such as shall become bankrupts," was passed in parliament begun and holden on 19th March, in the first year of the reign of king James, queen Elizabeth having died on the 24th March preceding; the parliament was continued until the 7th July, and then prorogued to February following; it does not appear when the statute passed. Held, that it must be pleaded as of the 1st year, the parliament in which it was passed having been begun to be holden in the first year. It is wrongfully printed in the statute book as of the second year. 2 M. & S. 123. 2 Rose, 8. — 3. The operation of the stat. 49 Geo. 3. c. 121. s. 14. is not retrospective. 2 Taunt. 181.

(U) *Miscellaneous.*

1. To persons discovering bankrupt's effects, 5*l.* per cent. and such other reward as the major part in value of the creditors shall think fit. Stat. 5 Geo. 2. c. 30. s. 20. — 2. Persons in possession, &c. of bankrupt's goods, &c. not disclosing, &c. forfeits double the value of all such goods, &c. Stat. 13 Eliz. c. 7. s. 6. Forfeiture to be levied and distributed. Ibid. — 3. Trustees not discovering the trust to forfeit 100*l.* and double the value of the property concealed. Stat. 5 Geo. 2. c. 30. s. 21. — 4. Gaoler wilfully suffering bankrupt to escape forfeits 500*l.* Stat. 5 Geo. 2. c. 30. s. 18. — 5. If a surety enter into a bond with a principal, conditioned for the performance of covenants contained in an agreement for a lease, such surety is still liable, although the principal become bankrupt, and be discharged under 49 Geo. 3. c. 121. s. 19. 1 Moore, 196.; and see 4 Taunt. 90. — 6. If a bankrupt obtains his certificate before the bail are fixed, the certificate will discharge them; but if they are fixed before the certificate is allowed, they will not be discharged; for the certificate has no operation till it is allowed, and has no relation back. 1 Burr. 244. ib. 436. 2 Bla. 811. — 7. But bail in error are not entitled to relief, although the bankrupt obtains his certificate pending the writ of error; for they cannot surrender the principal. 1 T. R. 624.

BAR.

Bar of Estate. Vide CHANCERY, (4 S 4.) — COPYHOLD, (C 9.) — ESTATES, (B 22. 25. 27, &c.) — FINE, (I 1, &c. — K 1, &c.) — GARRANTY, (H 1, &c. — I 1, &c.) — PLEADER, (S 6.)

Bar in Pleading. Vide ABATEMENT, (I 23.) — ACCORD, (D 1, 2.) — ACTION, (K 1, &c. — L 1, &c.) — APPEAL, (G 7, &c.) — ASSISE, (B 13, &c. — C 4.) — DETT, (G 13.) — PLEADER, (C 41. 85.) — E 27, &c. — O 15. — S 11. — 2 D 7, &c. 13. — 2 Y 5, &c.) — 3 I 9. — 3 K 12. 16. 20. 22, &c. — 3 L 12, &c. — 3 M 34.) — VOUCHER, (F 2.)

BARGAIN AND SALE.

(A) Of goods and chattels. p. 199.

(B 1.) Of lands and tenements. p. 199.

(B 2.) By what words it shall be. p. 199.

(B 3.) How it operates. p. 199.

(B 4.) By what deed. p. 200.

(B 5.) When it shall be inrolled. p. 201.

(B 6.) How the inrolment shall be made. p. 201.

(B 7.) In what place. p. 202.

(B 8.) Within what time. p. 202.

(B 9.) How it shall relate. p. 202.

(B 10.) There shall be no averment after an inrolment, contrary to the purport of the deed. p. 203.

(B 14.) What shall be a sufficient consideration. p. 204.

(B 12.) How a bargain and sale shall be pleaded.
p. 205.

(A) Of

(A) Of goods and chattels.

A bargain and sale is, where a man makes a contract with another for the sale of goods or chattels, lands or tenements, and at the same time makes the sale of them.

If the contract be executory, it amounts to a covenant, or agreement, upon which covenant, debt, or assumpsit lies. *De quo vide Agreement*, (A. 3, 4.)

If the contract be executed by actual sale, this is a bargain and sale.

When a bargain and sale vests a property, vide in Biens, (D 3.)

What things may be sold, vide in Assignment, (A.) Grant (C.)

(B) Of Lands and Tenements.

So, if a man bargain and sell lands or tenements, this by the common law passes the use, which now shall be executed by the st. 27 H. 8. 10. Pl. Com. 301. b. 303. a. 2 Inst. 671.

And a bargain and sale of land may be for years, for life, or in fee. Pl. Com. 81. b.

(B 2.) By what words it shall be.

To a bargain and sale of lands, the words (bargain and sell) are not essential; for any words, that will raise an use at the common law, are sufficient; and therefore, if a man by indenture demise, grant, set, and to farm let lands to another for years, that is a bargain and sale. R. 8 Co. 94. a. 2 Inst. 672.

So, if he alien, and grant; or give, and grant. 2 Inst. 672. Cro. El. 166.

Or, give, grant, and confirm. R. 3 Leo. 16.

So, if he covenant to stand seised to the use of another in fee, and the deed be inrolled. 7 Co. 40. b. 2 Inst. 672. 1 Leo. 25.

So, if he enfeoff, sell, and grant. Dal. 115.

But where the intent appears to make an estate in possession at the common law, and not by way of use, the words do not amount to a bargain and sale: as, if there be a letter of attorney in the deed to make livery, or a covenant in the deed to make livery. R. 8 Co. 94. a. 2 Inst. 672. Cont. 3 Leo. 16. Cont. 2 Rol. 787. l. 25. Vide Covenant, (G 2.)

So, if A. alien, bargain, and sell a reversion with attornment, it passes, though the deed be not inrolled. R. 2 Cro. 210.

(B 3.) How it operates.

If a man, who has only a reversion, bargains and sells an acre of land, the reversion passes. Pl. Com. 433. b.

So, if a corporation bargain and sell land, it is well; for they may give an use, though they cannot be seised to an use. R. 2 Leo. 122.

If the bargainer, upon his bargain and sale reserve a rent, it is good; for the use and possession pass *tanquam uno flatu*. 2 Inst. 673.

If a man demise, bargain, and sell to A. for years; A. has an election to take by demise at the common law, or by the bargain and sale. 2 Rol. 787. l. 35. R. 2 Co. 35. b.

Yet, if the bargainor afterwards release to A. and his heirs, to the use of B. in fee; A. cannot then elect to take by demise, and thereby divest the estate out of B. R. 2 Rol. 787. l. 45.

But by a bargain and sale nothing passes but an use; and therefore, if a man bargain and sell land, with a way over other land, the way without words of grant, being now newly created, does not pass. R. 2 Cro. 190.

So, if he bargain and sell a common, &c. newly created, and not *in esse* before. 2 Cro. 190.

If the king by indenture bargain and sell land to another, nothing passes by the common law, nor the st. 27 H. 8.; for the king cannot be seised to use, nor convey. R. 2 Cro. 50.

So a bargain and sale of lands to A. and his heirs, to the use of another; nothing passes to the *cesty que use*, for there cannot be an use upon an use. Poph. 81. R. Bend. 61. Dy. 155. pl. 20. 1 And. 37. Vide in Chancery, (4 W 2.)

So a bargain and sale to A. for life, with power to make leases, is void as to the power. Poph. 81.

If a man, at the common law, had bargained and sold his land generally, the use would be decreed to the bargainee and his heirs; for in respect of the consideration, the whole use shall be intended to pass. 1 Co. 87. b. 100. b.

But now, nothing passes to the bargainee, but for his life. 1 Co. 87. b.

If a bargain and sale by an infant be inrolled, nothing operates by the inrolment, but it shall be avoidable. 2 Inst. 673. Mo. 42.

So a bargain and sale by husband and wife, being inrolled, does not bind the wife. 2 Inst. 673. (1)

(B 4.) By what deed.

By the common law, a bargain and sale of lands might be by parol, without deed. Poph. 48. R. 1 Leo. 18. 2 Inst. 675.

But now, by the st. 27 H. 8. 16. a bargain and sale of lands, &c. whereby any estate of inheritance or freehold is made, shall have no effect, unless it be by writing indented, scaled, and inrolled, &c.

Yet after this statute, a bargain and sale of lands in London, &c. by custom, would be good by parol; for the statute does not extend to cities, boroughs, or towns corporate. R. Dy. 229. a. 2 Inst. 675. Poph. 49. Vide London, (N 3.) Vide post, (B 5.)

The indenture for a bargain and sale of lands of freehold, or inheritance, must be in writing, and not in print or stamp. 2 Inst. 672.

It must be in paper or parchment, and not in other materials. 2 Inst. 672.

And it is sufficient, if it be indented, though it has not the word, indenture. R. 3 Leo. 16. 2 Inst. 673.

(1) 1. A bargain and sale by tenant for years and the reversioner, may operate as a surrender by the tenant for years to the reversioner, and a bargain and sale by the reversioner only. Ld. Rd. 403. 404. — 2. A bargain and sale by tenant for years only does not operate by the statute of uses, and transfers no possession until actual entry. Ld. Rd. 400.

(B 5.) When it shall be inrolled.

So by the st. 27 H. 8. 16. no manors, lands, &c. of inheritance, or freehold, shall pass, &c. unless the bargain and sale be inrolled in one of the king's courts at Westminster, or before the clerk of the peace, &c. in the county where the lands lie, within six months after the date of such indenture. Provided, not to extend to lands in cities, boroughs, or towns corporate, where the mayor, &c. have used to inrol deeds, &c.

And therefore, every bargain and sale for life, or in fee, must be inrolled.

So, if he in reversion bargain and sell to the lessee for years and his heirs; nothing passes as a confirmation, unless the deed be inrolled. Dal. 37. Mo. 34.

But a bargain and sale for years need not be inrolled; for the statute extends only to inheritance and freehold. 2 Inst. 671. 2 Co. 36. a.

Nor a bargain and sale of lands in London, or any other city, borough, &c. Vide ante, (B 4.) 2 Inst. 676. Dal. 115. R. Yel. 123, 4. Vide London, (N 3.)

So inrolment is not necessary, where the deed does not operate as a bargain and sale, but as a covenant to stand seized, &c.

(B 6.) How the inrolment shall be made.

The inrolment must be in parchment only. 2 Inst. 673.

And the deed is sufficient, being inrolled, though it was not acknowledged by all the parties to it. 1 Sal. 389.

And though it was not acknowledged at all; for after inrolment it cannot be averred against. 1 Leo. 184. Vide post, (B 10.)

Though the inrolment be after the death of the party. 1 Sal. 389.

Though the seal be broke after the delivery. 2 Inst. 676.

Though the delivery be proved by witnesses, and not acknowledged by the party. 1 Sal. 389.

But by a rule in B. R. every deed there inrolled, shall be acknowledged in open court, and inrolled on the plea side. 1 Sal. 389.

(B 7.) In what place.

By the st. 27 H. 8. 16. the inrolment shall be in one of the king's courts at Westminster, or in the same county where the lands lie, before the custos rotulorum, two justices, and the clerk of the peace, or any two of them, whereof the clerk of the peace to be one.

By the st. 5 El. 26. inrolment in the counties of Lancaster, Cheshire, and Durham shall be in the chancery or exchequer, or before the justices of assise of the respective county.

If the court of B. R. &c. be adjourned to another place, yet the inrolment may be there, as well as at Westminster. 2 Inst. 674.

So an inrolment may be before the justices and clerk of the peace of the west riding in the county of York, if the land lies there. R. Hob. 128.

Otherwise, if the land be alleged *in comitatu Ebor'*, generally. Hob. 128. (m)

(m) An indorsement on the back of the deed by the proper officer, is sufficient evidence of the inrolment. Dougl. 57.

(B 8.) Within what time.

The inrolment shall be within six months after the date of the deed. And the computation shall be by lunar, not by calendar months. 2 Inst. 674.

If it be within six months, exclusive of the day of the date, it is sufficient. 2 Inst. 674. Mo. 40. 2 Rol. 520. l. 45. Hob. 139. Dy. 218. b. R. Dal. 41.

Or upon the day of the date. Semb. 2 Inst. 674. Dal. 42. Mo. 42. D. Hob. 140. 1 Rol. 387.

And if there be no date, within six months after the delivery. 2 Inst. 674. D. Hob. 140. 5 Co. 1. b.

But if it be dated, it ought to be within six months after the date, though the delivery be afterwards. 2 Inst. 674. Per two J. Weston cont. Dal. 42. Mo. 42.

(B 9.) How it shall relate.

If a bargain and sale be inrolled within six months, it relates to the time of the date, and passes *ab initio*. 2 Inst. 674.

And therefore, if the bargainor or bargainee die after the indenture executed, and before inrolment, the estate passes to the bargainee and his heirs, if it be inrolled within six months. 2 Inst. 674, 5. And the heir shall be in ward. R. Hob. 136. Ow. 149. 2 Cro. 408. R. 1 Rol. 627. l. 35.

So if a *præcipe* be brought against the bargainee, and a recovery upon it before inrolment, it is good; for he was tenant of the freehold. 2 Inst. 675. Ow. 70.

So if the bargainee sell before inrolment, and the deed be afterwards inrolled within six months, his sale is good. 2 Inst. 675. R. cont. Hob. 136. Vide Hob. 165. R. acc. 4 Leo. 4. Per three J. 2 cont. 2 Cro. 52.

Or if the bargainor, before inrolment, acknowledge a recognizance, &c. the bargainee shall avoid it. R. 2 Inst. 674.

Or give a judgment, &c. R. Cro. Car. 217.

So if the bargainor afterwards bargains and sells to another, and the second deed is first inrolled, and then the first bargain is inrolled within six months, the second shall be void. R. Dal. 41. Mo. 41. Dy. 218. b. Per Hob. 165.

So if the bargainor die before inrolment, his wife shall not enjoy her dower after the inrolment; if it be within six months. Cro. Car. 569.

But if the bargainee die before inrolment, and the deed be afterwards inrolled, his wife shall be endowed. R. Cro. Car. 217. Cont. Ow. 70. 150.

If the bargainee grant a rent before inrolment, it will be good. Cro. Car. 217.

So if a stranger release to the bargainee before inrolment, it is good. 2 Inst. 675.

If there be a bargain and sale of a manor, with an advowson appendant, and the advowson fall before inrolment, the bargainee, if the deed be afterwards inrolled, shall present. Cro. Car. 217. Vide 2 Bul. 8, 9.

If one joint-tenant make a bargain and sale, and before inrolment his companion

companion dies, yet only one moiety passes; for it has relation to the time of the deed. Co. Litt. 186. a. Cro. Car. 217. 569.

Though the bargain and sale has words which comprehend the whole, Ow. 70.

So if the bargainee makes a lease, and afterwards the deed be inrolled, the lease will be good. R. cont. Cro. Car. 110. R. cont. Carth. 178.

So if there be a bargain and sale of a reversion, the bargainee shall have the rent-charge incurred in the meantime between the deed and the inrolment. R. Lat. 157. Adm. 1 Sid. 310. Cro. Car. 218.

And by the bargain and sale the rent accrues without attornment. R. Cro. El. 166. Vau. 51.

But, if the rent, incurred before the inrolment, be paid to the bargainor, the bargainee has no remedy. Dy. 218. b. in marg. Ow. 69. 150.

So in the meantime, between the bargain and sale and the inrolment, the bargainee shall be adjudged to be seized, if the deed be afterwards inrolled within the six months, and not the bargainor. R. Ow. 70. 150. Dub. Cro. Car. 218. Vide Dan. 696.

But after the bargain and sale, and before inrolment, if the bargainor levies a fine to the bargainee, and then the deed be inrolled, the bargainee takes by the fine. R. Mo. 337, 8. 680. Cro. El. 917. R. 4 Co. 71. 2 Inst. 671, 2. 1 And. 285.

And it may be averred, that the fine was before inrolment, or *e contra*. R. 1 And. 285, 6.

So if the bargainor, in the meantime, between the date and inrolment, enfeoff the bargainee, he takes by the feoffment. R. Yel. 124. R. 1 Leo. 6. Semb. Ca. Ch. 115. R. 1 And. 113.

Otherwise, where an inrolment is not necessary, (*de quo vide ante*, B. 4, 5.) for then the bargain and sale is complete before the fine, or feoffment. R. Yel. 124.

So if the lord of a manor bargain, sell, enfeoff, and release to his copyholder, to the use of him and another, and afterwards makes livery, he takes by the feoffment, though the release might operate presently. 2 Rol. 787. l. 20.

So if a man lease for years part of the manor, and afterwards bargains and sells, demises and grants the whole to B. for years; if B. takes attornment of any of the tenants, he shall take by the grant; for he has an election to take by the one or the other, and when he takes attornment he elects by the grant, and therefore shall take the whole by the grant. R. 2 And. 203. 2 Co. 35.

So after a bargain and sale, if the deed be never inrolled, the bargainor continues seized.

And if, before the six months after the first deed, there is a second bargain and sale, which is well inrolled, it will be good. Cro. Car. 284.

(B 10.) There shall be no averment after an inrolment, contrary to the purport of the deed.

If the deed be inrolled, it cannot be averred, that it was *primo deliberat*. at a day since the date; for by the same reason it might be averred, that it was never delivered. R. 1 Leo. 183. 2 Leo. 122. Ow. 138.

And

And it cannot be averred, that it was not delivered. 1 Leo. 183.

Or that it was not acknowledged. 1 Leo. 184. Vide ante, (B 6.)

So since 16 Eliz. it cannot be averred, that it was not inrolled at the day indorsed for the inrolment; for that is part of the record. Semb. 2 Rol. 119, 120.

But before, no day of inrolment used to be entered, and then it might be averred, that it was not inrolled within six months. R. 2 Rol. 119.

But there may be an averment contrary to the operation of the deed: as, that it was not comprized within the deed. 1 Leo. 184, 5.

That nothing passed by the deed. 1 Leo. 184, 5.

So an infant, or feme covert, is not concluded by an inrolment. Vide ante, (B 3.)

So a stranger is not concluded by an inrolment, but may aver, that the deed was delivered after the date. R. Sav. 91. Per Holt, C. J. at Maidstone.

(B 11.) What shall be a sufficient consideration.—
Vide Covenant, (G 3, &c.)

A bargain and sale of land, whereby an use arises, ought to be made upon a valuable consideration.

As, for money paid. (n)

So it is sufficient, if it be under a condition or proviso to be void, if money is not paid, though no money is mentioned to be paid. 1 Leo. 6.

Or if the vendee by the same deed covenants, if the money is not paid, &c. to be seized to the use of the vendor. 1 Leo. 25.

So in consideration of money paid for other land. R. Mo. 547, 8.

So for the loan of 100*l.* per annum. 2 Rol. 782. l. 30.

So if upon a bargain and sale a rent be reserved, it is sufficient, without other consideration. 2 Rol. 788. l. 7. 1 Mod. 263.

So a pepper-corn reserved. Semb. 1 Mod. 263. R. 2 Mod. 253. 2 Vent. 35.

So money, paid by any one of a corporation in his private capacity, is sufficient for a bargain and sale to them in their corporate capacity. R. 2 Rol. 788. l. 5.

But a bargain and sale, for divers causes and considerations, without money, is not good. 1 Leo. 170. R. Cro. El. 394. 1 Co. 176. a. Vide Covenant, (G 4.)

Though it be recited by the indenture, that the bargainee was bound by recognizance, or obligation for the bargainor; if no money appears to be paid. R. Cro. El. 394. 2 Rol. 783. l. 40.

So, if a man bargain and sell land, in consideration of a marriage before had, or service done, it is not sufficient. Semb. Dal. 18.

Or, in consideration of natural affection to his son. R. 2 Cro. 127.(o)

Yet, if money was given, it may be averred, though it be not expressed by the deed. 1 Leo. 170. Mo. 570.

Though there be no mention in the deed of any consideration in particular, or in general terms. 2 Rol. 790. l. 15.

And, if the bargain and sale be mentioned by the deed to be for

money paid, it is sufficient, though none was paid (*p*); for the payment is not traversable. 1 Leo. 170. Mo. 570.

And, *pro quadam pecuniæ summa*, is sufficient, without ascertaining the *quantum*. 1 Leo. 170. Mo. 570. 2 Rol. 786. l. 45.

So a bargain and sale pleaded, without expressing, that it was for any consideration, is well. R. 1 Leo. 170. but Mo. 570. semb. cont. R. acc. Mo. 504.

Vide more post, (B 12.)

(B 12.) How a bargain and sale shall be pleaded.

If a bargain and sale be pleaded, the most regular form is, that such an one by indenture, of such a date, between such and such, *debito modo* in such a court, *infra 6 menses tunc proximos sequentes irrotulat. secundum formam statuti, &c. pro quadam pecuniæ summa bargainizavit & vendidit, &c.* 2 Sand. 11, 12.

If the deed be by the words, *dedi & concessi, &c.* yet, if it operates as a bargain and sale, it ought to be so pleaded. R. Cro. El. 166. Vide Pleader, (C 37.)

If a bargain and sale be pleaded, without alleging in what court it was inrolled, it will be bad. R. Yel. 213. And *juxta formam statuti*, does not supply it. 2 Cro. 291.

So, if it be said, *debito modo irrotulat.* in such a court, without saying *secundum formam statuti*, or, within six months, it will be bad. R. after verdict. Al. 19. Semb. Cart. 221.

But if *secundum formam statuti* be added, without saying, within six months, it is sufficient. Semb. 2 Sand. 11.

So, if it be said, *debito modo irrotulat.* in such a court within six months, it is good, although *secundum formam statuti*, be omitted. Semb. 2 Sand. 12.

So, if it be said, that such an one by indenture *bargainizavit & vendidit*, it is good, though *pro quadam pecuniæ summa* be omitted. Dub. Dy. 90. b. But it was R. acc. *ibidem* in marg. Semb. cont. Mo. 570. But it was R. acc. Mo. 504. 1 Leo. 170. Dub. Ray. 201. 1 Lev. 308. (q)

But if it should be bad upon demurrer, it will be good after verdict. R. 1 Lev. 308. R. 1 Vent. 109.

If there be a bargain and sale of a rent, the party ought to plead attornment, and *virtute cujus* he was seized, does not supply it. R. upon demurrer. Cart. 221.

If a bargain and sale be pleaded, it ought to conclude, that by virtue thereof and of the inrolment, and the statute of uses, he was seized, &c. 2 Sand. 12.

If a tenant for life who has a power by devise to make sale, sells, the vendee may conclude thus, though his estate only passed by the statute. Per Jones, two J. cont. Jon. 328.

So he ought to conclude, *quod intravit*; for, that by the statute of uses he was seized without entry, is not sufficient. R. Noy, 6.

(p) 1. So evidence is admissible to shew the real consideration paid in contradiction to that expressed. 3 T. R. 474. — 2. Or in addition thereto. 7 B. P. C. 70.
(q) The omission is a cause of special demurrer. 2 H. B. 259. Str. 1228. Wils. 91.

BARON.

Baron of the Realm. Vide DIGNITY, (B 6.)

Barons of the Exchequer. Vide COURTS, (D 10.)

Court-Baron. Vide COPYHOLD, (R 1, &c.)

BARON AND FEME.

(A) Feme sole.

(A 1.) What acts she shall do. p. 208.

(A 2.) What, a feme sole merchant. p. 208.

(A 3.) What, if the husband be in exile. p. 209.

(B) Marriage.

(B 1.) What shall be. p. 209.

(B 2.) Who may marry. p. 213.

(B 3.) Who not. p. 213.

(B 4.) What shall be within the Levitical degrees.
p. 215.

(B 5.) At what age. p. 215.

(B 6.) Who are husband and wife. p. 216.

(C) Divorce.

(C 1.) *A vinculo matrimonii. — Causâ præcontractûs.*
p. 217.

(C 2.) *Consanguinitatis aut affinitatis.* p. 217.

(C 3.) *Impotentia.* p. 218.

(C 4.) *Metûs.* p. 218.

(C 5.) *A mensâ et thoro.* p. 218.

(C 6.) How a divorce shall be obtained. p. 219.

(C 7.) The effects which follow. p. 219

(D) Husband and wife are one person.

(D 1.) In what respect. — The one cannot make an
estate to the other. p. 219.

(D 2.) Take a joint estate by entireties. p. 221.

(D 3.) When they take by moieties. p. 221.

(E) What the husband shall have by the marriage.

(E 1.) Freehold. p. 222.

(E 2.) Chattels real. p. 223.

(E 3.) Chattels personal. p. 225.

(F) What

(F) What goes to the wife.

(F 1.) If she survives. p. 227.

(F 2.) Though she does not survive. p. 228.

(F 3.) *Paraphernalia*. p. 228.

(G) What acts by the husband and wife bind the wife.

(G 1.) Alienation by fine. p. 230.

(G 2.) By common recovery. p. 231.

(G 3.) By demise. Vide Estates, (B 92. — G 4, 5.) p. 231.

(G 4.) By customary conveyance. p. 233.

(H) What acts by the husband and wife do not bind the wife, p. 233.

(I 1.) What acts by the husband alone bind his wife. p. 234.

(I 2.) What put her to her action. p. 234.

(I 3.) *Cui in vitâ*. p. 235.

(K) What acts by the husband alone do not bind his wife. — By the st. 32 H. 8. 28, &c. p. 235.

(L) What laches of the husband prejudices his wife. p. 237.

(M) What not. p. 237.

(N) What acts of the wife prejudice the husband. p. 237.

(O) The power of the husband during the coverture. p. 238.

(P) What acts a feme covert may do without her husband.

(P 1.) Alien her estate. p. 239.

(P 2.) Accept an estate. p. 239.

(P 3.) Execute an authority, &c. p. 240.

(Q) What not. — Cannot make a contract, etc. p. 241.

(R) What acts of the husband the wife may waive after his death. p. 244.

(S 1.) What she may affirm by her agreement. p. 245.

(S 2.) The effect of her agreement. p. 245.

(S 3.) What shall be an agreement. p. 245.

(S 4.) What

- (S 4.) What shall be a waiver. p. 246.
(S 5.) What not. p. 246.
(S 6.) The effect of her waiver. p. 246.
- (T) What estate the wife cannot waive. p. 246.
- (V) In what actions husband and wife ought to join.
p. 247.
- (W) In what, the husband shall sue alone. p. 249.
- (X) In what, the husband may sue alone or join with
his wife. p. 250.
- (Y) What actions shall be against husband and wife.
p. 252.
- (Z) What actions the husband shall have by his sur-
viving. p. 253.
- (2 A) What the wife, if she survives. p. 254.
- (2 B) What actions shall be against the husband, if
he survives. p. 254.
- (2 C) What not. p. 255.
- (2 D) Pleading by husband and wife. p. 255.

(A) Feme sole.

(A 1.) What acts she shall do.

A feme sole, before her marriage, may do all acts for disposition, &c. of her lands or goods, which any man in the same circumstances may do. (a)

But the law does not require any thing indecent of her : and therefore, if she does homage, she shall not say, I become your woman, but I do homage unto you, &c. Co. Litt. 66. a. Lit. s. 87.

(A 2.) What, a feme sole merchant.

So by the custom of London, a feme covert may act as sole in the way of trade, if she buys and sells in trade for herself, with which her

(a) 1. A widow before her marriage with a second husband, conveyed her fortune to trustees to her own use ; and held valid against the second husband. 2 B. C. C. 345. 2 Cox, 28. — 2. And a settlement by a lady about to marry, of her property in trust for her sole use, benefit, and disposition, gives a separate estate. 1 Mad. 199. — 3. Vide 1 Ves. J. 28. 275. 2 Ves. J. 194.

husband does not intermeddle. Cro. Car. 69. Vide London, (N 7.) (b)

And in such case, if there be a suit against her, the husband shall be joined only for conformity; for the wife only shall be in execution. Cro. Car. 69.

So it shall be, if the husband formerly used the same trade, but at the time of the contract is a soldier beyond sea, and does not intermeddle. Per three J. Cro. Car. 69.

But every feme sole who trades within London is not a feme sole merchant. Cro. Car. 69.

(A 3.) What, if the husband be in exile.

So, if the husband (c) be banished for life, his wife may make a testament, and in all cases act as a feme sole. R. 2 Ver. 104, 5. Vide in Abatement, (E 6. — F 2.) (d)

(B) Marriage.

(B 1.) What shall be.

Ut conjugium subsistat non aliud natura requirere videtur, quam ut talis sit cohabitatio quæ fæminam constituat quasi sub oculis & custodia

(b) 1. A feme covert, sole trader, by the custom of London, may bind herself by simple contract, but not by deed. 4 T. R. 363. Lofft. 134. — 2. But the courts at Westminster will not enforce that custom of the city of London, by which a married woman, a trader, is accounted a feme sole. 4 T. R. 361, 362. Lofft. 134. — 3. Nor can an action against a feme covert, as sole trader, be removed by *habeas corpus* from the city courts. 2 Blk. 1060.

(c) 1. Has abjured the realm. Co. Litt. 132. b. 133. a. — 2. Been banished. Ibid. — 3. Or transported. 2 Blk. 1197. Co. B. L. 43. — 4. Is a felon. — 5. Or an outlaw.

(d) 1. The court will not stay proceedings in an action brought by a wife separated from her husband, in his name, for an injury to her property, upon the defendant's application, supported by the husband's affidavit, that the suit had not his sanction. 9 East, 471. — 2. But wife may plead without her husband, where the husband is transported; for transportation is a temporary death. Lofft. 142. — 3. Yet the relation of a marriage is not suspended, where the wife lives apart from her husband with a separate maintenance, secured to her by deed; therefore she cannot, under those circumstances, contract and be sued as a single woman. 8 T. R. 545. — 4. And even when it was considered that a feme covert, with a separate maintenance, was liable as a feme sole, 4 T. R. 766.; it was necessary that the maintenance should be permanent; therefore, a woman was not liable in respect of alimony awarded to her, by the ecclesiastical court, during the pendency of a suit only. 5 T. R. 679. — 5. So the relation of marriage is not suspended between a British subject and his wife, by his deserting her and going abroad. 11 East, 301. — 6. Nor can the wife contract and be charged as a feme sole, from the husband having abandoned her for adultery. 8 T. R. 547. 1 B. & P. 338. — 7. Nor will the residence of a British subject in an enemy's country, and with the view of adhering to the enemy, render his wife chargeable as a single woman. 2 B. & P. 226. — 8. Though she passed for such. 1 N. R. 80. — 9. Nor can the wife of a foreigner resident abroad, contract and be charged as a feme sole, though she pass herself off for such. 3 Campb. 123.; overruling 2 Esp. 554. 587. 1 B. & P. 357. — 10. Yet if a woman married *de facto* to one whom she knows to have another wife executes a deed as his wife jointly with him, she is bound as a feme sole. 3 Anst. 833.

maris ; ad hoc in homine accedit fides quâ se fœmina mari obstringit. Grot. de jure belli & pacis, l. 2. c. 5. s. 8, 9.

Nec lex divina amplius exegisse videtur ante evangelii propagationem. Grot. *ibid.* s. 9.

Apud veteres Romanos triplex erat contrahendi matrimonii formula, confarreatio, coemptio, et usus. Seld. *Ux. Heb.* l. 2. c. 1.

Sic apud Hebræos ; nummuli datio, pactionis libellus, et coitus. Seld. *Ux.* l. 2. c. 1.

Ut fœmina foret verè uxor, ante legem Mosaicam, et sine eâ, præter mutuum in vitæ lectique societatem consensum, concubitus erat necessarius. Seld. de jure N. et G. l. 5. c. 4.

Sed lege Mosaicâ per sponsalia fuit verè uxor, per nuptias perfectè. Seld. *ibid.* c. 4. *Ux. Heb.* l. 2. c. 1. 13.

Sic jure Cæsareo et plerumque pontificio sponsalia sunt matrimonii ipse contractus, et stipulatio, et nuptiarum futurarum repromissio. Seld. *Ux.* l. 2. c. 1. Mo. 170.

So, by the common law. Co. Lit. 34. a. If it be a contract *per verba de presenti*. Dy. 369. a. R. 6 Mod. 155. Sal. 437. Carth. 99. (e)

So, if a contract *per verba de futuro* be afterwards executed by consummation. Semb. Sal. 438.

Sed interdum jure pontificio sponsalia tantum obligant ad futuri matrimonii pactionem, consensu nondum satis firmati. Seld. *Ux.* l. 2. c. 1.

Et jure Cæsareo, et Hebraico, æque ac pontificio, nuptiæ sunt solennes illi ritus quibus matrimonium perficitur. Seld. *Ux.* l. 2. c. 1. 13.

So by the common law, till the marriage be solemnized, the wife cannot be endowed *ad ostium ecclesiæ*. Co. Lit. 34. a.

And the usual pleading of a marriage is *per presbiterum sacris ordinibus constitutum*. Sal. 120.

By an order of parliament 1653. 6. confirmed by the st. 12 Car. 2. 33. marriage shall be before a justice of peace, and declared by him.

Yet during this order, a marriage by a person *infra sacros ordines* was good. 1 Sid. 64.

By the st. 1 W. & M. 18. no person, taking the oaths, &c. shall be prosecuted in the ecclesiastical court, for non-conforming to the church of England.

And if such marriage, in the face of a separate congregation, be questioned in the spiritual court, a prohibition goes. 3 Lev. 376. Sal. 438.

So a marriage, by a popish priest by the latin service, in a chamber, was allowed, and a second marriage disannulled by a sentence in the ecclesiastical court, and the person for such second marriage convicted of felony. 4 vol. of Trials, 745. 763.

Yet after contract, *si coeunt*, they are not suable for fornication, but only for a contempt of the church. Mo. 170. Sal. 438.

And if subsequent espousals ensue, they have relation to the first contract, and avoid all mesne acts. Mo. 170.

But if a man sick in his bed be married to a woman with child, pri-

(e) But now by 26 G. 2. c. 33. s. 15. no suit or proceeding shall be had in any ecclesiastical court to compel a celebration of any marriage in *facie ecclesiæ*, by reason of any contract of matrimony, whether *per verba de presenti*, or *per verba de futuro*.
vately,

vately, out of a church and chapel, without celebration of mass, it was not a marriage. Semb. 1 Rol. 359. l. 15.

So by a contract of marriage, it is no marriage, if espousals do not afterwards ensue. Semb. Mo. 170. (f)

So,

(f) 1. Marriages in England are now regulated by 26 G. 2. c. 55. entitled "An act for the better preventing of clandestine marriages." — 2. By s. 11. all marriages solemnized by licence, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had without the consent of the father of such of the parties so under age, if then living, first had, or if dead, of the guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian, then of the mother if living and unmarried, or if there be no mother living and unmarried, then of the guardians of the person appointed by the court of chancery, shall be void to all intents. — 3. But by s. 12. in case any guardian or mother shall be *non compos mentis*, or in parts beyond the seas, or shall refuse or withhold their consent to the marriage of any person, any person desirous of marrying may apply by petition to the lord chancellor, who may proceed in a summary way to examine the cause, and declare the marriage to be proper, if it shall so appear; which shall be as good as if the guardian, &c. had consented. — 4. The forms required to be observed by this statute, in order to give validity to marriages, are, by s. 1. that all banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel (in which banns have been usually published), belonging to the parish or chapel where the persons to be married shall dwell, according to the form of words prescribed by the rubrick prefixed to the office of matrimony in the book of common prayer, upon three Sundays preceding the solemnization of the marriage, during the time of morning service, or of evening service (if there be no morning service upon any of those Sundays), immediately after the second lesson; and if the persons to be married shall dwell in divers parishes, &c. the banns shall be in like manner published in the church, &c. belonging to such parish, &c. wherein each of the said persons shall dwell; and where both or either of the persons shall dwell in any extra-parochial place, (having no church, &c. wherein banns have been usually published, then the banns shall be published in some parish church, &c. adjoining such place; and where banns shall be published in any church, &c. belonging to any parish adjoining to any extra-parochial place, the parson, vicar, minister, or curate, publishing such banns, shall certify in writing under his hand the publication thereof: and all other rules prescribed by the said rubrick concerning the publication of banns, and solemnization of matrimony, not hereby altered, shall be observed: and in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches, &c. where such banns have been published, and in no other place. — 5. But by s. 2. no parson, &c. shall be obliged to publish the banns, unless the persons to be married shall, seven days before the time required for the first publication, deliver to such parson, &c. a notice in writing of their true christian and surnames, and of the house or houses of their respective abodes within such parish, &c. and of the time during which they have dwelt, inhabited, or lodged in such house or house. — 6. And by s. 3. no parson, &c. solemnizing marriages, &c. between persons both or one of whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriages, without consent of parents or guardians, unless such parson, &c. shall have notice of the dissent of such parents, &c.; and in case such parents, &c. or one of them, shall openly and publicly declare in the church, &c. where such banns shall be so published, his dissent to such marriage, such publication of banns shall be void. — 7. By s. 4. no licence shall be granted by any archbishop, bishop, or other ordinary or person, to solemnize any marriage in any other church, &c. than in the parish church, &c. of the parish, &c. within which the usual place of abode of one of the persons to be married shall have been for four weeks immediately before granting such licence; or where both or either of the parties shall dwell in any extra-parochial place, having no church or chapel wherein banns have been usually published, then in the parish church, &c. of some adjoining parish. — 8. And by s. 5. all parishes where there shall be no parish church, &c. belonging thereto, or none wherein divine service shall be usually celebrated every Sunday, shall be deemed extra-parochial places for the purposes of this act. — 9. By s. 6. the right of the archbishop of Canterbury,

So, if the marriage be not conformable to the ecclesiastical law, the husband shall have no right by the ecclesiastical law; as, if the marriage be in a separate congregation by their preacher, who is a lay-man, the husband will not be entitled to administration. R. 1 Sal. 120.

Yet, where there is a marriage in fact only, the wife, or her children, who were not in fault, may be entitled to a temporal right. Adm. Sal. 120.

terbury, and his officers, to grant special licences, to marry at any convenient time or place, by virtue of the 25 H. 8. c. 21. is saved and reserved. — 10. But by s. 7. no surrogate, deputed by any ecclesiastical judge, who hath power to grant licences of marriage, shall grant any such licence before he hath taken an oath before said judge, faithfully to execute his office according to law, to the best of his knowledge, and hath given bond in 100*l*. to the bishop of the diocese, for the due and faithful execution of his office. — 11. And by s. 8. all marriages solemnized in any other place than a church, or such public chapel, unless by special licence as aforesaid, or that shall be solemnized without publication of banns, or licence from a person having authority to grant the same, first had, shall be void. — 12. But by s. 10. after the solemnization of any marriage, under a publication of banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes, &c. wherein the banns were published; or where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of four weeks as aforesaid, was in the parish, &c. where the marriage was solemnized; nor shall any evidence be received in either of said cases to prove the contrary, in any suit touching the validity of such marriage. — 13. By s. 14. and 15. the churchwardens and chapelwardens of every parish or chapelry are required to provide books of vellum or durable paper, in which all marriages and banns there published and solemnized shall be registered, in a particular manner and form hereby prescribed. — 14. And by s. 15. all marriages shall be solemnized in the presence of two or more witnesses, besides the minister who shall celebrate the same, and immediately after an entry thereof shall be made in such registry, in which it shall be expressed that said marriage was celebrated by banns or licence; and if both or either of the parties married by licence be under age, with the consent of the parents or guardians, as the case shall be, and shall be signed by the minister with his proper addition, and also by the parties married, and attested by two witnesses present at the solemnization of such marriage. — 15. By s. 17. this act shall not extend to the marriages of any of the royal family. — 16. Nor by s. 18. to Scotland; nor to any marriages amongst quakers, or amongst persons professing the Jewish religion, where both the parties are quakers or Jews; nor to any marriages solemnized beyond the seas. — 17. No toleration act, or statute for the relief of nonconformists, has dispensed with the marriage act in favour of the dissenters of England. — 18. And the 31 G. 3. c. 32. which relieves roman catholics from certain penalties and disabilities, to which they were before subject in England, expressly provides, that nothing therein shall be construed to repeal any part of the marriage act, or any other statutes concerning marriages. 1 Gab. 404. 407 — 409. 411. — 19. Illegitimate children are within the marriage act. 11 East. 1. — 20. And those names are the parties *true* names, by which they are known in the world. 3 M. & S. 250. 537. — 21. The entry directed to be made is not requisite to the validity of the marriage. B. S. C. No. 162. — 22. But marriages contrary to the essentials of the act are void, and not voidable only. B. S. C. 154. — 23. A marriage is void, if celebrated in a chapel erected since 26 Geo. 2. c. 33. although marriages may, in fact, have been frequently celebrated there. Dougl. 659. Vide 21 Geo. 3. c. 53. — 24. British subjects resident in a British settlement abroad, are governed by the laws of this country, and consequently, with respect to marriage, by the law which existed here before the marriage act, viz. the canon law. Therefore, where two British subjects, being protestants, were married at Madras, by a Portuguese roman catholic priest, according to the catholic form, in the Portuguese language, in a private room, and the ceremony was followed by cohabitation; held, that this was a valid marriage, though without a licence from the governor, which it is the custom at Madras to obtain. 2 Mars. 243.

So,

So, if there be a marriage *de facto* (g), the husband and wife may sue for a debt due to the wife. Sal. 437.

(B 2.) Who may marry.

By the st. 32 H. 8. 38. no prohibition, God's law except, shall impeach any marriage without the Levitical degrees; and none shall be admitted in the spiritual court to any process, plea, or allegation contrary to this act.

And therefore, if an idiot *a nativitate* marry, the marriage is good, and the issue legitimate. R. 1 Rol. 340. 1. 32. D. 1 Sid. 112. (h)

So now since the st. 2 Ed. 6. 21. and 5 Ed. 6. 12. all ecclesiastical persons may marry. Vide 2 Inst. 686.

And though the st. 2 & 5 Ed. 6. were repealed by the st. 1 Mar. 2. yet that being repealed by the st. 1 Jac. 25. the st. 2 & 5 Ed. 6. are revived; and the marriage of ecclesiastical persons is valid, and their issue legitimate. R. 12 Co. 9. 2 Inst. 686, 7.

(B 3.) Who not.

But none can marry any one who is married to another then alive. Vide post, (B 6.)

Though the first husband or wife enter into religion. 1 Rol. 340. 1. 25. 30.

Or they are divorced *a mensa & thoro* only. Co. L. 235. a. Vide post, (C 5.)

So no one precontracted to any ought to marry another; for the contract makes the marriage, if espousals afterwards ensue; for they have relation to the first contract, and avoid all mesne acts. Mo. 170. Vide post, (C 1.)

(B 4.) What shall be within the Levitical degrees.

So since the st. 32 H. 8. 38. a marriage within the Levitical degrees shall be disallowed: and therefore, a marriage with a next of kin, being prohibited by the xviii. and xx. of Leviticus, none can marry his or her father, mother, brother, sister, son or daughter. 2 Inst. 683. R. Vau. 306, 7. Eq. Ca. 157.

(g) 1. To assert rights anywise depending upon the relation of husband and wife, an actual marriage must have taken place. — 2. That it has taken place will in all cases, save one, be intended from the relation of husband and wife appearing to subsist — 3. The excepted case is where the husband sues for adultery, when he must prove his marriage by direct testimony. 4 Burr. 2057. 1 Blk. 632. — 4. Which proof may be by copy of the register; nor are the minister, clerk, or subscribing witnesses, the only competent witnesses to the identity of the parties. Dougl. 171. — 5. But where a (at least personal) liability, depending upon this relation, is to be imposed upon two as husband and wife, or upon either of them, the plaintiff, ignorant of the truth, will establish an indefeasible case by proving, that the parties have represented themselves as married, though in fact they are not.

(h) The 15 G. 2. c. 30. enacts, that in case any person who shall be found a lunatic, by any inquisition, taken by virtue of a commission under the great seal of Great Britain, or any lunatic, or person under a phrensy, whose person and estate by virtue of any act of parliament shall be committed to the care of trustees, shall marry before he or she shall be declared of sane mind by the lord chancellor, or by such trustees or the major part of them, every such marriage shall be void to all intents.

So, none can marry any next of kin to them by affinity, any more than if they were of kin by consanguinity: and therefore, if one marry the mother, sister, or daughter of his wife, it will be within the Levitical degrees. Levit. xviii. v. 17, 18. Vau. 310.

And though the sister of his wife is prohibited, Levit. xviii. 18, 19. only during his wife's life, yet it is now unlawful after the death of his wife; for it is within the Levitical degrees. R. Vau. 320. 312. 324. 328. and is so declared by the 13 Can. Apost. by the st. 28 H. 8. 7. and by the parochial table. R. Skin. 37.

So a father, brother, or son of the husband is unlawful for the wife; for by the interdict to the man, the same degree is prohibited to the woman. 2 Inst. 683. Vau. 305.

So all marriages mentioned in the st. 28 H. 8. 7. and all mentioned in the parochial table, which by the 99th canon made *anno* 1603, and duly confirmed, are declared contrary to the law of God, are therefore now unlawful. Vau. 323. 325. 327, 328. 215.

So a marriage with a next of kin to his next of kin by affinity or consanguinity, are within the Levitical degrees, and disallowed by the st. 28 H. 8. 7. and 32 H. 8. 38.

And therefore it appears by Levit. xviii. and xxi. by these statutes, and the parochial table, which enumerate thirty unlawful marriages within the Levitical degrees, that none can marry his grandmother, aunt, or grand-daughter on the part of his father, or on the part of his mother. Vau. 308, 9. Eq. Ca. 158.

So a woman cannot marry her grandfather, uncle, or grandson.

So a man cannot marry the grandmother, aunt (*i*), or grand-daughter of his own wife. Vau. 311. R. Eq. Ca. 156.

Nor a wife those relations of her husband.

So an uncle cannot marry the daughter of his brother or sister, though not expressly mentioned Levit. xviii. or xx. for it is in the same degree, viz. next of kin to his next of kin. 2 Inst. 683. Vau. 323. R. Skin. 37.

So he cannot marry the daughter of his wife's brother or sister; for he is uncle to such by affinity. R. Cro. El. 228. Mo. 907. 4 Leo. 16. Mann. R. Hob. 181. R. Vau. 248, Pearson. Acc. Vau. 323. Semb. 3 Lev. 364. R. 2 Lev. 254. 2 Jon. 118. R. Ray. 464. R. Lut. 1077. D. 2 Inst. 683. Semb. 5 Mod. 448. Semb. 1 Sid. 434. R. in exchequer, 8 Geo. inter Butler and Gastril. Eq. Ca. 157, 158. Vide Noy, 29.

Nor the daughter being the bastard of his sister; for the Levitical law says, *non accedes ad proximam sanguinis tui*. Semb. 5 Mod. 168. Comb. 356.

Nor the daughter of his mother's sister.

So a marriage to the grandfather, great-grandfather, and great-great-grandfather, and so interminately in the direct line ascending or descending, is unlawful; for it has the same repugnancy as a marriage in the first lineal degree. Vau. 242.

But by the st. 22 H. 8. 38. no prohibition, God's law except (which exception extends to cases of pre-contract, impotence, former marriage, &c. which otherwise would be allowed by this act. 2 Inst. 687. Vau.

220, 221.) shall impeach any marriage without the Levitical degrees; and none shall be admitted to any process, &c. in the spiritual court contrary to this act.

No law has expressly determined what marriages are without the Levitical degrees, but Levit. xviii. 6. says, Thou shalt not uncover the nakedness of thy near of kin; and Levit. xxi. 2. names father, mother, brother, sister, son, and daughter as near of kin; and Levit. xviii. illustrates this general rule, by a prohibition to discover the nakedness of the father and mother, v. 7. of brother, sister, v. 9. 16. of sons v. 15. in which the daughter is included, though not named. And Levit. xviii. v. 12, 13, 14. prohibits to uncover the nakedness of the father or mother's brother or sister, and of the son's daughter, v. 10. because near of kin to father, &c.; and of the wife's daughter or sister. v. 17, 18, because her near of kin; and by parity all near of kin to the near of kin by affinity or consanguinity, and beyond these degrees, Levit. xviii. or xx. the st. 28 H. 8. 7. or the parochial table do not extend, and therefore all marriages out of these degrees seem now lawful in the collateral line. Vau. 307.

And therefore, a marriage with the relict of his grand-uncle, the wife of his grandfather's brother, though not allowed by the canon or civil law, shall not now be impeached. R. by all the judges of England. Vau. 241. 250. 2 Vent. 16.

Nor the marriage of a son by a former *ventre* with the daughter of his father's wife by her first husband; though the *Karaites* made a rule, which prohibits any two near of kin to marry two other near of kin. 2 Inst. 684. Vau. 318.

Nor a marriage between cousin-germans; for it is allowed by the st. 32 H. 8. 38. Vau. 218. 2 Inst. 684. Eq. Ca. 159.

Or with a woman who was godmother to his cousin at baptism or confirmation. 2 Inst. 684.

And if the spiritual court impeach a marriage without the Levitical degrees, a prohibition lies. Cro. El. 228. Vau. 207 to 220. 304. Vent. 10 to 15. 21. Eq. Ca. 156.

(B 5.) At what age.

By the law of Scotland, a woman cannot *contrahere sponsalia* before her age of seven years. 1 Rol. 342. l. 20.

But by the common law, persons may marry at any age. Co. Lit. 33. a.

And upon such marriage the wife shall be endowed, if she attain the age of nine years, of whatsoever age her husband be; but not before the age of nine years. Co. L. 33. a.

And if the husband alien his land, and afterwards his wife attain the age of nine years, she shall be endowed of the land sold before. Co. L. 33. a.

And if there be a writ to the bishop to certify, whether they were ever coupled in lawful matrimony, he ought to certify that they were, of what age soever the husband be. Co. L. 33. a. R. Dy. 369. a.

And at any age the husband shall have trespass *de muliere abducta cum bonis viri*. 1 Rol. 341. l. 35.

And if the husband die before age of consent, the marriage is dissolved, but not disaffirmed *ab initio*. Semb. cont. Mo. 741.

Yet to such marriage the husband or the wife may agree or disagree at his or her age of consent.

By the law of Scotland, and the civil as well as the common law, the age of consent of the man is the age of 14 years. 1 Rol. 342. C.

The age of the woman by the civil and common law is the age of 12 years. 1 Rol. 342. l. 15. 17.

By the law of Scotland, it is the age of 14 years. 1 Rol. 342. l. 18.

If at the time of the marriage the husband be above 14, and the wife under 12, when she attains the age of 12 years, the husband may disagree as well as the wife, and so *vice versa*. Co. L. 79.

A disagreement to the marriage before the age of consent is of no force. Vide 1 Rol. 340. l. 50.

For, if the husband disagree before 14, and marry another, the issue of the 2d marriage is a bastard. 1 Rol. 341. l. 45. Cont. Dy. 13. a. in marg.

But a disagreement before, if the husband marries another after the age of fourteen, amounts to a disagreement after the age of consent. 1 Rol. 341. l. 15. R. Mo. 575.

If the husband, or wife, at the age of consent, once agree to the marriage, they cannot afterwards disagree.

And a continuance of the suit in trespass *de muliere abducta cum bonis viri*, after that age, amounts to an agreement. 1 Rol. 341. l. 35.

And if after the age of consent, the husband or wife disagree by parol, yet cohabit as husband and wife, this amounts to an agreement. R. 1 Rol. 341. l. 25.

Though the words of disagreement are reduced into writing, and signed by the husband. 1 Rol. 341. l. 25.

Otherwise, if the disagreement be made before the ordinary. Per Warberton. 1 Rol. 341. l. 32.

(B 6.) Who are husband and wife.

If a man and a woman marry under the age of consent, they are husband and wife, till disagreement. Vide ante, (B. 5.) 1 Leo. 53, 4.

So, if a man marry a woman precontracted, they are husband and wife, till divorced.

So, if he marry within the Levitical degrees. 1 Rol. 340. l. 10, 17. 357. l. 45.

So, if a priest had married before the st. 32 H. 8. 38. 1 Rol. 340. l. 35. 40. 2 Inst. 687. Dy. 185. a. in marg.

So if there be a marriage by duress. Per Yaxly, Frowick cont. Kel. 52. b. Cont. per Windham, 1 Sid. 65. D. cont. 1 Rol. 340. l. 20. R. acc. Cro. Car. 488. 493. Per Noy, Dy. 13. a. in marg.

So, if they are divorced only *a mensa & thoro*. 1 Rol. 341. l. 40. Co. L. 235. a. Vide post, (C 5.)

But a marriage, when a former husband or wife is alive, is null, as well by the spiritual as by the common law, and they are not husband and wife *de facto*. 1 Rol. 340. l. 13. R. Cro. El. 857, 8. 1 Rol. 357. l. 40. 360. F. 1 Sal. 121.

So, if a nun had married; for she was under a vow of chastity; and therefore

therefore her marriage was void. Cont. 1 Rol. 340. l. 41. Acc. 2 Inst. 687. 12 Co. 9.

Or, a monk. 12 Co. 9. 2 Inst. 687. (k)

(C) Divorce.

(C 1.) *A vinculo matrimonii.*—*Causâ præcontractûs.*

A divorce is *à vincula matrimonii*, or, *à mensa & thoro*. Co. L. 235. a.

A divorce will be *à vinculo* when the husband or wife was præcontracted to another. Co. L. 235. a. Vide ante, (B 3.)

And a divorce for præcontract may be made, without summoning any to answer in the spiritual court, except the parties to the præcontract: as, if A. be contracted to B. and afterwards marry C., the divorce may be by a libel by B. against A. without process against C. Mo. 170.

So a divorce is well made by a sentence, that A. do marry B. without a sentence to declare the marriage void between A. and C. R. Mo. 170.

But by the st. 32 H. 8. 38. all marriages in England, solemnized in the face of the church, and consummated, &c. shall be valid, notwithstanding any præcontract of both or either party not consummated.—But this clause was repealed by the st. 2 & 3 Ed. 6. 23. and not revived by the st. 1 El. 1.

So, by the st. 33 H. 8. 6. in Ireland. But it being repealed in Ireland by the st. 3 & 4 Ph. & M., nothing was revived by the st. 2 El. 1. there, except what concerns the degrees of consanguinity.

So, if a marriage be dissolved by a sentence upon a præcontract, the man and former wife are not complete husband and wife, till the marriage be solemnized. Cont. per Noy, but Twisd. acc. 1 Sid. 13.

(C 2.) *Consanguinitatis, aut affinitatis.*

So a divorce, *causâ consanguinitatis, aut affinitatis*, is *à vinculo*. Co. L. 235. a. 47 Ed. 3. pl. 78.

Though it were for spiritual affinity, when that was allowed.

(k) Where a woman is sued as a feme sole, and between the original process and appearance marries, the suit does not abate. Loft. 27.—2. And if an action is originally brought against a wife when sole, and pending the suit she marries, judgment and execution against her only, are regular. 4 East, 521.—3. Ejectment against a single woman who marries before trial. Afterwards there is a verdict, judgment and execution by *habere facias possessionem et si. fa.* against her by her maiden name. Objected that the execution was irregular, since where a new person shall become chargeable to the execution of a judgment who was not party to the judgment, there a *scire facias* ought to be sued against him, to make him party to the judgment. Here the husband has acquired the term and the goods of his wife, but held regular. For as to the *hab. fac. poss.* the judgment in ejectment shews that the wife had no right or interest in the term; therefore it is not to take from the husband his, but to get possession of the plaintiff's property. As to the *sci. fa.* it was a mere nullity, since the wife had no goods, and the goods of the husband could not be seised under such a writ. 3 M. & S. 557.—4. If a woman marry a second husband living the first, and the second not privy, she is during the cohabitation to be considered as a servant to him, and he is entitled to the benefit of her labour. Str. 80.

By the law of the Hebrews, there was no divorce for incest; for the marriage was null. Van. 313.

(C 3.) *Impotentia*.

So a divorce, *causâ impotentia*, will be *à vinculo*. Co. L. 235. a. 1 And. 185. 5 Co. 98. b. 2 Leo. 170. Dy. 178. b. 179. a.

A divorce for impotence, or frigidity, may be upon an universal impotence; as, if he be an eunuch.

Or, for a perpetual impotence previous to the marriage *quoad hanc*, be it natural, or accidental. R. 11 Jac. Earl of Essex. 2 Lco. 172, 3.

If there be a divorce upon evidence, which shews a perpetual impotence *quoad hanc*, and the husband afterwards marries, and has issue by another wife, the issue shall be legitimate; for the first sentence shall be in force till repealed, and the second marriage good, unless it be dissolved in the life of the parties, and a man may be *habilis et inhabilis diversis temporibus*. R. 5 Co. 98. b. 2 Leo. 169. 173. Dy. 179. a.

So, if the woman afterwards marry, and she and her second husband levy a fine, and then the former husband by a second wife has issue, the fine shall not be stayed. Dy. 179. a. 2 Leo. 169.

So, if the husband bring trespass *pro uxore abductâ cum bonis viri*, and pending the action, the husband and wife are divorced *causâ impotentia*; the action does not abate; for it is founded upon the possession, and *ne unques accouple* is no plea. 2 Lco. 170.

(C 4.) *Metûs*.

So, a divorce, *propter metum*. Co. L. 235. a.

Or, *propter sævitiam*.

A divorce for severity is grounded upon the law of nature. Cro. Car. 463.

And it will be a cause for it, if the husband strip his wife of her apparel, and other necessities. 1 Sid. 118.

But a divorce for severity, is not a divorce *à vinculo*, but a separation *à mensâ & thoro* only. Cro. Car. 462.

And a subsequent marriage, after such divorce, is not lawful. Cro. Car. 463.

(C 5.) *A mensâ et thoro*.—Vide ante (C 4.)

A divorce, *causâ adulterii*, will be *à mensâ & thoro* only. Co. L. 235. a.

For such a divorce arises upon a cause subsequent, not antecedent to the marriage. Cro. Car. 462.

So a divorce, *causâ professionis*, does not bastardize the issue.

And therefore, if a man, after a divorce *à mensâ & thoro*, marry another woman, the second marriage is void. R. Mo. 683. Co. Lit. 235. a. Vide ante, (B 3. 6.)

If the husband releases a legacy, given to the wife during the divorce, it will be discharged. R. Mo. 665. D. Cro. Car. 463.

But if the husband sells a term for years, which he has in right of his wife, equity will grant an injunction. R. Eq. Ca. 43.—2d part, 2 Mod. Ca.

(C 6.) How

(C 6.) How a divorce shall be obtained.

Si vir, aut uxor convolat ad secundas nuptias, instituenda est lis per legitimum virum contra uxorem & superinductum, aut è contra per legitimam uxorem contra virum & superinductam, in causa divortii à vinculo matrimonii & restitutione obsequiorum conjugum. Ought. Ordo. Jud. 283.

Sic solet fieri pro nullitate matrimonii inter impuberes, si ante ætatem requisitam dissentit una partium. Ought. Ord. Jud. 284.

Sic pro nullitate matrimonii in gradu consanguinitatis, aut affinitatis. Ought. Ord. Jud. 286.

Aut ubi pars aliqua est inhabilis, causâ impotentiae, &c. Ought. Ord. Jud. 286.

But a divorce cannot be prosecuted after the death of the parties. R. 1 Rol. 360. H. 1 Sal. 121.

So a marriage cannot be drawn in question upon any collateral surmise, after the death of the parties; and if it be, a prohibition goes. 1 Rol. 360. l. 50. 52.

So a divorce by sentence, in the life of the parties, cannot be re-examined after the death of the parties. R. 2 Cro. 186.

So, after the death of the husband, the marriage shall not be drawn in question, though the wife be alive. 1 Rol. 360. l. ult.

Nor, after the death of the wife, though the husband be alive. Carth. 271.

And if a marriage was incestuous, and a suit commenced for it against husband and wife, and one of them dies, though they may proceed against the survivor to enforce penance, yet if they proceed to bastardize the issue, a prohibition goes. R. Carth. 271. Comb. 200. 4 Mod. 182.

(C 7.) The effects which follow.

If there be a divorce *à vinculo matrimonii*, the issue between them will be bastards. Vide Bastard, (A.)

And a sentence for divorce stands in force, till reversed by appeal. 1 And. 185. 2 Leo. 169. 5 Co. 98. b.

So, a sentence for nullity of a marriage *in causa jactitationis maritagi*. R. Carth. 225.

And if the parties die, an examination will not be allowed to prove an heir, contrary to the sentence. R. 2 Cro. 186. 7 Co. 43.

(D) Husband and wife are one person.

(D 1.) In what respect.—The one cannot make an estate to the other.

Husband and wife are one person in law. Lit. s. 168. 291.

And therefore, by no conveyance at the common law, could the husband give an estate to his wife. Co. Lit. 112, a, 187. b.

Nor

BARON AND FEME.

Nor the wife to her husband. Co. L. 187. b. (l)

So, an husband cannot covenant or contract with his wife. Co. L. 112. a. (m)

So, if a man make a bond or contract to a woman, and they afterwards intermarry, the bond or contract is discharged. D. Cro. Car. 551.

So, if two men make a bond or contract to a woman, or *à contra*, and one of them marries with her, the bond, &c. is discharged. D. Cro. Car. 551.

Though it be intended for the advantage of the wife during the coverture; as, that she shall have such rents, &c. at her disposal. Ca. Ch. 21. 117.

But now, by the stat. 27 H. 8. the husband (n) may make an estate to his wife: as, if he make a feoffment to the use of his wife for life in tail, or in fee, the estate will be executed by the stat. 27 H. 8. and the wife will be seised. Co. L. 112. a.

So, if the husband covenant to stand seised to the use of his wife. Co. L. 112. a.

So, the husband may devise to his wife; for that does not take effect till after his death. Co. L. 112. a. b.

And this, where by custom he might devise at the common law. Lit. s. 168.

So, where the husband or wife act *en autre droit*, the one may make an estate to the other; as, if the wife has an authority by will to sell, she may sell to her husband. Co. L. 112. a.

So, a covenant or contract by a man with a woman is not destroyed by their marriage, where the thing is future, to be done after the marriage determined; as, to leave his wife worth so much after his death. R. per two J. Hob. cont. Hut. 17. Hob. 216. R. 2 Cro. 571. Per two J. Holt, cont. Hil. 11 W. 3. B. R. *inter* Gage & Acton, (Reported Comyns's Reports, 67.) 1 Sal. 326. R. Pal. 99. Carth. 512. (o)

That she may make a disposition by her will. Ca. Ch. 118.

So, the marriage does not defeat a breach before. R. Skin. 409.

(l) 1. But articles of agreement between them, for the wife to allow the husband so much out of an estate left to her separate use, are binding in equity without the intervention of the trustees, as an execution of the power. Bunb. 205. — 2. A gift by the husband to the wife, without intervention of trustees, held good in equity. Bunb. 205. — 3. But the grant by the lord of the manor of copyhold lands to his wife immediately, without the intervention of another, is void 2 Wils. 254.

(m) Husband, lord of a manor, cannot grant lands to his wife, immediately, by a copy of court-roll. 2 Wils. 254.

(n) 1. The rule that a feme covert is to be considered as a feme sole as to her separate property, does not extend to transactions with her husband. 2 Ves. J. 498. — 2. Wife may, by consent in court, dispose in favour of her husband of her reversionary interest in personality. 3 Mod. 384. — 3. Vide 10 Ves. 580. 1 Cox, 193. 2 Ves. J. 488. 498. 8 Ves. 183. 9 Ves. 369.

(o) 1. 1 Ld. Rd. 515. 5 T. R. 381. — 2. If a bond on marriage be given to trustees, conditioned to *leave the intended wife* a sum of money, and the wife be made the executrix of the obligor, she may retain the amount of the bond, and plead such retainer to an action brought against her by another bond creditor of her husband. 13 Geo. 2. 7 Mod. 8vo. edit. 292. Willes, 186. S. C. — 3. *Secus*, if the bond be conditioned to *pay the trustees* the money in trust for the wife; but in such case the wife may pay the trustees out of the assets, or pay out of her own money and retain assets *pro tanto*, or confess judgment to the trustees to cover assets. *Ibid*.

So,

So, a covenant for the benefit of the wife, though destroyed by the marriage, shall be aided in equity. R. 2 Ver. 481. (v)

So, an agreement to make a marriage settlement shall be decreed in equity after the marriage, though it was to be made before the marriage. R. 2 Vent. 343.

*So, an agreement, to permit the wife to dispose of so much money during her coverture. Dub. 1 Ver. 409.

(D 2.) Take a joint estate by entireties.

So, if an estate be granted, or conveyed to an husband and wife, and their heirs, they do not take by moieties, as other joint-tenants, but the entire estate is in both. R. 2 Lev. 39.

And, if an estate be granted to an husband and wife and another person, the husband and wife have but one moiety, and the other the other moiety. Lit. s. 291.

And therefore, if husband and wife have a joint estate, and the husband commit treason, and dies, the wife shall recover the entire estate from the king, who seized it as forfeited. Co. L. 187. a.

So, if an estate be granted to husband and wife and their heirs, where the husband is a villein, and the wife free, and the lord enters, and the wife survives; she shall have the whole. Co. L. 187. b.

If husband and wife take an estate, and the husband alone aliens the whole, it is not good for a moiety. Semb. Co. El. 187. b.

So, if an estate be granted to husband and wife and another person, and the husband, by feoffment, aliens the whole, and the wife survives, and dies; the other person shall have the entire estate; for he and the wife surviving were joint-tenants of the right of the whole estate, and therefore he shall have the whole by survivor. Co. L. 187, 8. 327. b.

So, if an estate be granted to a man and a woman and their heirs, who marry before the estate is completely conveyed, they take by entireties; as, if there be feoffment to a man and a woman, who marry, and then livery is made *secundum formam chartæ*, they take by entireties. Co. L. 187. b.

So, if there be a grant of a reversion to them, and they marry before attornment. Co. L. 187. b.

So, if there be a feoffment to them with warranty, and afterwards they marry, and recover in value, they shall have the estate recovered by entireties. Co. L. 187. b. Dy. 149. b. in marg. (q)

(D 3.) When they take by moieties.

But, if an estate were conveyed to the use of a man and woman, who afterwards marry, and then the stat. 27 H. 8. is made, they have

(p) 1. Husband under a decree to propose a settlement of stock belonging to his wife, transferred to the accountant-general by order, came to an agreement with her out of court, and while they lived apart, but not legally separated, to take part and give up the rest; this agreement does not bind the wife; and the husband dying, before any steps were taken for executing it, the whole survived to the wife 4 Ves. 15. — 2. Vide 2 B. C. C. 51.

(q) A mortgagee of a copyhold estate in possession under a forfeited mortgage, and considered as irredeemable, devised it as land to husband and wife in fee; the conveyance of the husband alone, without the concurrence of his wife, passes no interest against the wife surviving. 5 T. R. 652.

BARON AND FEME.

moieties; for the statute executes the use in the same quality, &c. Co. L. 187. b. R. Mo. 22. Dy. 149. b.

So, if it be to them in tail, as well as in fee-simple. R. Mo. 92.

So, they do not take by entirety, if the estate be expressly limited to them in severalty; as, if it be to A. for life, to the husband in tail, and to the wife for years. Co. L. 187. b. (r)

(E) That the husband shall have by the marriage.

(E 1 a.) Freehold.

If a woman be seised of an estate of inheritance, and marries, her husband shall be seised in her right. Co. L. 351. a.

And the husband has a freehold in the right of his wife, upon which there may be a remitter. Ibid.

And the husband may take a release, or confirmation, to enlarge his estate. Co. L. 299. a.

But yet the wife has such an interest, that if she be attainted of felony

(r) 1. Where a notice to quit, and demand of the possession of a tenement, held by a single woman, have been given to her, and she marries before the appointed day, no fresh demand need be made upon the husband, as herself is liable under the 4 Geo. 2. c. 28. for holding over. 1 N. R. 174. — 2. The court will not discharge a feme covert on a common appearance, unless the coverture be open and notorious. 2 Blk. 903. — 3. Yet it is irregular to arrest a feme covert without her husband, even though it be returned as to the husband *non est inventus*, since having no property of her own, she might, if allowed to be arrested, be kept imprisoned for life. 1 T. R. 486. — 4. And unless where a married woman has obtained credit as a feme sole, the court will discharge her, when arrested, on common bail. 6 T. R. 451. — 5. So where a married woman obtains credit by mistakenly, and not through fraud, representing herself as a widow, she cannot be arrested. 1 East, 16. — 6. So where a married woman has a settlement by deed of separation, and she is trusted by a creditor, knowing her to be married and living separate, she will, when arrested, be discharged. 3 Smith, 576. 7 East, 582. — 7. So a married woman will be discharged, when arrested for penalties on the lottery act 2 H. B. 57. — 8. So a feme covert arrested, will be discharged on motion, unless she obtained credit as a single woman, by actually asserting herself to be such. 1 N. R. 54. — 9. Yet if a married woman obtain credit by pretending that she is sole, she will not be discharged on filing common bail, when arrested for the debt, but will be left to plead her coverture. 5 T. R. 194. — 10. And where the husband and wife were French, and the husband was abroad, the court refused to discharge the wife arrested for a sum obtained by her on her own account. 1 B. & P. 8. — 11. So where the husband and wife are aliens, and the husband resident abroad, the wife when arrested will not be discharged on motion, though she did not obtain credit by passing off for a single woman. 2 N. R. 380. — 12. So if husband or wife are sued upon her contract *dum sola*, and both arrested, the wife is not entitled to be discharged; secus if arrested alone. 1 Taunt. 254, 255, 256. — 13. So where a married woman has been arrested as acceptor of a bill of exchange at the suit of an indorsee, the court will not order the bail bond to be cancelled on an affidavit that the drawer, when he drew the bill, knew the defendant to be a married woman. 2 Marsh. 40. — 14. So where a woman was arrested as drawer of a bill of exchange, at the suit of an indorser, the court refused to discharge her, on the affidavit of a third person that she was a married woman. 2 Wils. 124. 2 Blk. 720. — 15. But if husband and wife be rendered after judgment in discharge of bail, the wife will be discharged on motion. 3 Wils. 124. 2 Blk. 720. — 16. Yet a feme covert, in execution on her warrant of attorney given as sole, will be left to her writ of error. 3 B. & P. 220. 1 Id. 128. — 17. But where a plaintiff knowingly sues a married woman as a feme sole and arrests her, he must pay the costs of the motion for her discharge. 3 Taunt. 307. — 18. The court will not stay proceedings in an action brought by a wife, separated from her husband, in his name, for an injury to her property, upon the defendant's application, supported by the husband's affidavit, that the suit had not his sanction. 9 East, 471.

before issue by her husband, the lord may enter for the escheat. Co. L. 351. a.

And if the husband be attainted of treason or felony, the king shall not have the freehold, but only the pernancy of the profits during the coverture. Co. L. 351. a. (s)

• (E 2.) Chattels real.

So, if a woman be possessed of a chattel real, by her marriage, the husband shall have it in her right: as, if she was possessed of a term for years. Co. L. 46. b. 351. a. 300. a. (t)

So, if she had the trust of a term, the husband shall have it, except in special cases. Vide in Chancery, (2 M. 9.)

So, if she had a wardship, the husband shall have it. Co. L. 351. a. Pl. Com. 294. a.

So, an estate by statute-merchant, staple, or *elegit*. Co. L. 351. a.

So, every chattel real in possession. Ibid.

If the husband survive his wife, he shall have the whole interest which his wife had in such chattel real. Co. L. 46. b. 351. a. 300. a.

And that, without taking out administration to her. 1 Rol. 345. l. 40. Semb. Eq. R. 234.

If husband and wife mortgage a term of the wife's, and the husband survives, he shall have the equity of redemption. R. Hob. 3.

If the wife has a copyhold for years, and takes husband, who survives, he shall have it for the residue of the term. R. Dy. 251. a. 3 Leo. 9.

So, the husband in his lifetime may dispose of all his wife's interest in such chattel real, by grant, or demise. Co. L. 46. b. 351. a. 1 Rol. 343. l. 15.

So, the interest of a term, &c. which they have jointly. 1 Rol. 343. l. 12.

So, the husband may forfeit such chattel real by his outlawry, or attainder; for that is a disposition in law. Co. L. 351. a. R. Pl. Com. 263. 1 Rol. 851. l. ult. Lane, 54.

So, the sheriff may sell upon an *elegit*, for the debt of the husband. Co. L. 351. a.

So, it may be extended upon a statute or recognizance of the husband.

So, he may grant it upon condition, which will be a disposition, though the executor enter for the condition broken. Co. L. 46. b.

So, if the husband recover the term in an ejectment in his own name, it is a disposition. Ibid.

(s) If a leasehold is settled on marriage, the term expires and is renewed for three lives, and, on the death of the husband, comes to his daughter a feme covert, who dies, leaving a daughter; she is entitled as special occupant, and the husband has no right. 3 Atk. 695. 1 Ves. 298.

(t) The residue of a term for years granted to a woman and her heirs immediately upon the death of a person she is about to marry, to hold from that time, so far vests in the husband upon the marriage, that his personal representative will be entitled to such residue if he survives the wife. 1. H. Bl. 535. Thus where a man who was possessed of a term for years granted the residue of it from his death to a woman he was going to marry, and afterwards married, and her heirs, after which the woman died, then the husband died without taking out administration to her, the court held the residue of the term passed to the personal representative of the husband, because the grant vested an immediate interest in the wife. 1 H. Bl. 535. p. c.

BARON AND FEME.

So, the husband may dispose of part of his wife's interest: as, he may demise for part of the years, rendering rent, and the rent shall go to his executor or administrator, though the wife survive. Ibid.

So, he may make a lease, to commence after his death, and it will be good, though the wife survive. R. Cro. El. 287. Poph. 5. Mo. 395.

So, if he submit to the arbitrament of B. who awards the term to A., it will be a disposition by the husband against his wife. Dy. 183. a. in marg.

So, if tenant in dower lease for years, take husband, and die, the husband shall have the rent in arrear in his wife's life-time. R. Mo. 7.

But the husband cannot devise a chattel real which he had in right of his wife. Co. Lit. 351. a. 1 Rol. 344. l. 15. Pl. Com. 418. b. R. Poph. 5.

So, he cannot charge such chattel real beyond the coverture. Co. L. 351. a. Pl. Com. 418. b.

If there be judgment against the husband, execution cannot be sued after his death against the term. 1 Rol. 344. l. 21. 346. l. 17.

So, the term after the death of the husband shall not be extended upon a statute or recognizance acknowledged by the husband. 1 Rol. 346. l. 17.

Nor for a debt to the king due from the husband. Semb. 2 Rol. 157. l. 30. 1 Rol. 346. l. 20.

So, if the wife had a chattel real only *en auter droit*, as executor or administrator, the husband cannot dispose of it. Co. L. 351. a. (u)

So, if the wife was guardian. Pl. Com. 294.

So, if a woman was joint-tenant of the chattel real, and marries, and dies; the husband shall not have it, but it survives to the other joint-tenant. Co. L. 185. b.

So, if the wife had only the possibility of a term, the husband cannot dispose of it: as, if there be a lease to husband and wife for their lives, and afterwards to the executor of the survivor, the husband cannot grant this executory interest. Co. L. 46. b. 351. a. R. 10. Co. 51. a.

So, if a woman be dispossessed of a term, and takes husband, and dies before recovery of the possession, the husband shall not have it. Co. L. 351. a.

So, the husband, if he survives, shall not have a right of ward, or other chattel real in action. Ibid.

So, if the husband does not dispose of the chattel real of his wife, if she survive him, she shall have it. Co. L. 46. b. 351. a. 1 Rol. 349. C.

So, all that was not disposed of by the husband: as, if a term be demised by the husband for part of the years, the wife shall have the residue. Co. L. 46. b.

So, if he demise, reserving part, the wife shall have the part excepted. 1 Rol. 344. l. 38.

If he demise the term, if A. so long live, she shall have the possibility. 1 Rol. 345. l. 2.

(u) But if the wife had it as executrix to a former husband, he may. 3 Wils. 277.

If the term be extended, the wife shall have it after the extent satisfied. 1 Rol. 344. l. 25.

If the husband and wife mortgage the term, and the husband pay the money, and enter, and die, the wife shall have it. R. 1 Rol. 344. l. 45. 50.

(E S.) Chattels personal.

All chattels personal, which the wife has in possession in her own right (x), are vested in her husband by the marriage, though he do not survive. Co. L. 351. b. (y)

So, chattels personal, not in possession at the time of the marriage, if they are reduced into possession during the coverture. Co. L. 351. b.

So, if the husband make a letter of attorney to one, to receive a debt or legacy due to the wife, who receives it, though he does not pay it to the husband, yet it vests in his possession. R. 1 Rol. 342. l. 40. 45. Mo. 452.

So, if the wife's portion be secured by settlement of land and he makes a jointure for it, it shall be vested in the husband, though it be not paid. Per Lord Keeper, Ca. Ch. 189.

So, if the husband and wife have a judgment for the debt of the wife, but no execution; the husband, if he survives, shall have it, and shall take out execution without a *scire facias*. R. 1 Mod. 179. 3 Mod. 189. 1 Sid. 337.

So, chattels personal of a mixt nature, partly in possession, and partly in action, the husband shall have, if he survives: as an avoidance of a church, which falls during the coverture. Co. L. 351. a.

So, arrearages of rent service, charge, or seck, which incur during the coverture. Co. L. 351. a. Vide post, (F 1.)

So, if chattels are given to the wife after the coverture, the interest vests in the husband.

Though he has not possession of them before the death of his wife.

So, if a legacy be given to a feme covert; to be paid twelve months after his death, and the wife die within the twelve months, the interest goes to the husband; for it was vested in him, and he might release within the twelve months. Per Mont. 2 Rol. 134.

So, if there be judgment for the husband alone, in an action by him alone for the debt of the wife, the husband shall have it. 1 Ver. 356. (z)

So, if an award be made to pay a debt due to the wife, to her husband, though the husband die before payment. (a)

But

(x) 1. Secus those *in auter droit*. Lofft. 83. — 2. Nor shall he have those, though he survive. Ibid.

(y) 3 T. R. 631.

(z) 3 T. R. 631.

(a) 1. 1 Ver. 396. — 2. If a widow has a decree for arrears of jointure, marries, a report of the arrears, confirmed, and the husband assigns said arrears, and all subsequent, and all benefit of the decree, and demises the jointure during the joint lives of him and his wife to trustees, in trust after the wife's death, to pay a bond from the husband to A., and a debt from him to B., and the residue as he should by deed or will appoint, and first the husband dies and then the wife. The bond shall first be paid to A., then the debt to B., and the residue to the administrator of the husband,

BARON AND FEME.

But choses in action are not vested in the husband by the marriage, though he survive: as, debts upon bond or contract, unless they are recovered. Co. L. 351. b. (b)

So, a debt to the wife, though the debtor be a bankrupt, and the husband pay the contribution, if he does not receive the debt. 2 Ver. 707.

An estray in the manor of the wife, unless it be seized by the husband. Co. L. 351. b.

A portion due to an orphan in the hands of the chamberlain of London, unless it be recovered, or received by the husband; for it is a chose in action. R. 2 Vent. 341. R. Ca. Ch. 182. Vide Guardian, (G. 2.) (c)

So, a distributive part due to the wife, by the stat. 22 & 23 Car. 2. upon the distribution of an estate of an intestate; for it is a chose in action, till the husband receive or recover it. Semb. Sho. 25.

A mortgage to the wife. 2 Ver. 402.

Reliefs, or rents due before marriage. Co. L. 351. b.

Yet the husband is entitled to be administrator to his wife. Vide in Administrator, (B 6.)

And now, by the stat. 32 H. 8. 37. arrears of rent, due before coverture, are given to the husband. Co. L. 351. b.

So, chattels personal, which the wife has *en auler droit*, as executrix or administratrix, are not vested in the husband by the marriage. Co. L. 351.

Though the husband and wife have a judgment for a debt due to the wife's testator. R. Jon. 248.

Nor chattels, of which she has a bare possession, as by bailment, or trover. Co. L. 351. b. (d)

not of the wife. 3 P. W. 197. — 3. If A. survives her first husband, who leaves her a legacy, marries B., dies, B. administers, dies, his administrator gets in the legacy; he is entitled to it, and not the administrator *de bonis non* of A., who shall be considered in equity as a trustee for the administrator of B., and if he brings bill for it, it is a breach of trust, and he shall pay costs. 1 Atk. 458. — 4. Trinkets and jewels, given to a wife before marriage, become the husband's again by the marriage, and are liable to his debts, if his personal estate is not sufficient. 2 Atk. 104. — 5. If husband dies, without administering to the personal estate the wife had in her own right, it goes to his representative, and vested in him before administration taken out, and not to her next of kin. 3 Atk. 526. 1 Wils. 168. — 6. And though administration is granted to such next of kin, (as the ecclesiastical court by 31 Ed. 6. c. 11. is bound to do,) yet in equity he is looked on as a mere trustee. Ibid.

(b) 2 Ves. 677. 3 T. R. 631. 4 T. R. 364.

(c) If husband is attainted of felony, and pardoned on condition of transportation for life, and afterwards the wife becomes entitled to an orphanage share of personal estate, it shall not belong to the husband but to the wife. 3 P. W. 37.

(d) 1. If a woman, having obtained interlocutory judgment, marries before final judgment, and after final judgment husband and wife bring *scire facias quare*, &c. the court will not set it aside on motion, but put defendant to his *audita querela*. Bunb. 282. — 2. So, if a woman plaintiff, marries after interlocutory judgment, and then executes writ of inquiry. Bunb. 283.

(F) What goes to the wife.

(F 1.) If she survives.

Chattels real, which the husband had in right of his wife, she shall have, if she survives; and they do not go to the executor or administrator of the husband. *Vide ante*, (E 2.)

So a chattel real, which the husband and wife have jointly.

So a statute, recognizance, or obligation made to the husband and wife; for they are joint-tenants of it, and it survives to the wife. 1 Rol. 342. l. 27. 29.

So if the wife and her husband were joint-tenants of a rent-charge, &c. for their lives, the wife, if she survives, shall have the arrearages incurred during the coverture. 1 Rol. 350. l. 11. Mo. 887.

So if husband and wife make a demise of the wife's land, rendering rent, and the assent after the death of the husband, she shall have the arrearages incurred during the coverture. 1 Rol. 350. l. 14.

So if a woman seised of a rent-service, &c. marry and survive, she shall have the arrears during the coverture. 1 Rol. 350. l. 5. Ca. Ch. 189.

So if she demise for life or years, and then marry and survive. 1 Rol. 350. l. 7. 17. (e)

So chattels of a mixt nature, which the husband shall have if he survive, the wife shall have if she survive. *Vide ante*, (E 3.)

So if the husband alien part of a term, which he has in right of his wife, the wife shall have the residue, if she survives. Cro. El. 33.

So if the wife has an annuity for life, and the husband release to the grantor by deed, and die, the wife shall have it; for the release of the husband discharges it only during the coverture, it being an estate for life. R. Mo. 522.

So if there be a judgment for husband and wife, upon a debt due to the wife, she surviving shall have it. 1 Ver. 396. (f)

So if there be a decree in equity for the husband and wife, for a legacy given to the wife. 1 Ca. Ch. 27. 1 Ch. R. 234.

So goods which the wife has as executrix or administratrix. R. 1 And. 22. Bend. Pl. 252. Dy. 331. a.

So money in the hands of a trustee for a feme covert, if the husband makes no disposition of it. 1 Ver. 161. *Vide ante*, (E 3.)

So money charged upon land for the wife's portion, and which A. covenants to pay to the husband, though the husband settles a jointure upon the wife. R. 2 Ver. 191.

(e) 1. If a wife, having separate estate by marriage-settlement, advances money to pay off incumbrance on husband's estate, and the receipt is delivered to her, it is a loan, and she shall stand in the place of the mortgagee. 2 Atk. 383. — 2. If husband has a mortgage on his own estate, and his wife joins with him in charging her own, if she survives, she shall stand in the place of the mortgagee, and be satisfied out of the husband's estate. *Ibid*.

(f) If husband recovers a judgment for the debt of the wife, and dies before execution, the wife is entitled, not the husband's executor. 3 Atk. 20.

So a mortgage, or other chose in action, though the husband assigns it to another, who agrees to dispose of it for the husband and wife in a purchase. R. 2 Ver. 402. (g)

(F 2.) Though she does not survive.

So chattels real or personal in action, which were not vested in the husband during the coverture, go to the executor or administrator of the wife, though the husband survives; but the husband may be administrator. 3 Mod. 186. Vide ante, (E 2, 3.) (h)

(F 3.) Paraphernalia.

So the wife shall have, after the death of her husband, as her paraphernalia, a necessary bed and apparel, agreeable to the quality of her husband. 1 Rol. 911. l. 20. (i)

Necessary and convenient apparel. 1 Rol. 911. l. 25. 30. 31.

So if the husband deliver cloth to his wife for her apparel, and die before it be made, she shall have the cloth. R. 1 Rol. 911. l. 35.

So pearls and jewels to the value of 370*l.*, which the wife used for ornament in the life-time of her husband, being suitable to her degree, were allowed as paraphernalia. Cro. Car. 343. 1 Rol. 911. l. 45. Jon. 334. (k)

So

(g) If there is a settlement in consideration of marriage, and of the present fortune of wife A., and of certain covenants after mentioned, one of which is, that her mother shall pay her husband 200*l.* as addition to A.'s fortune; another with the trustees, that mother shall give A. or her executor, or one of her children, equal to what she gives her other children; and she by will gives a legacy and makes her executrix, and part of the residue lapses to A. by the death of a legatee in testatrix's life, and the husband assigns over these sums, with proviso, that assignee on request, shall resign; and A. survives him and dies, these sums survive to A.'s representative. 2 Ves. 675.

(h) 1. Diamonds given to the wife by the husband's father on the marriage, are a gift to her separate use, and she is entitled to them in her own right. 3 Atk. 393. — 2. So a present from a stranger during the coverture. Ibid. — 3. So trinkets given by the husband in his life-time. Ibid.

(i) 1. Dowry money is not to be considered as a separate estate of the wife, or inter paraphernalia; but rather as a gift to the church. 2 P. Wms. 79. — 2. Whatever a husband gives to his wife to be worn as an ornament of her person only, is to be considered as a paraphernalia, if she wears it. 3 Atk. 393. — 3. But not otherwise. Semb. Ibid. — 4. But to make an ornament a paraphernalia, it is not necessary that the wife should wear it always. 3 Atk. 394. — 5. It is sufficient if she wears it on particular occasions. Ibid. — 6. A wife cannot alien her paraphernalia. Ibid.

(k) 1. The value of the jewels makes no difference. 2 Atk. 77. — 2. The husband's possession makes no difference, if the wife wore them whenever she was dressed. Ibid. — 3. A wife as to paraphernalia has been of late considered as a creditor, and having a lien on real estate. Ibid. — 4. Where the wife's paraphernalia are applied to the payment of debts, the wife shall be put in the place of the creditors and have the same remedy against the representatives of the husband the creditors might have had. 1 P. Wms. 730. — 5. Where there have been debts standing out against a husband, a wife has been admitted as a creditor to the value of her paraphernalia, on trust-estates created for payment of debts. 2 Atk. 77. 3 Atk. 430. — 6. Where a husband gives jewels to his wife, merely to be worn as ornaments of her person, (though he might have given them to her separate use,) yet in this case they are only paraphernalia. 3 Atk. 393. — 7. The husband may alien all such jewels as a wife has to wear for the ornament of her person in his life-time. Ibid. — 8. Jewels which a wife did not wear at all times, but only on birth-days and

So jewels to the value of 500 marks, for the wife of a viscount. R. 2 Leo. 166. Mo. 213.

The property of the paraphernalia is vested in the wife presently upon the death of her husband. Cro. Car. 344. Jon. 333.

But the wife shall not have ornaments as her paraphernalia, where there are not assets for payment of debts. Cro. Car. 346. 1 Rol. 911. l. 50. 35. Per Manwood, Mo. 216. Ch. R. 416. (l)

If the grandfather give 2000*l.* to A. for a portion, who releases it at his father's request, upon a promise to take care that his portion be otherwise paid, the wife of the father shall not have her paraphernalia before the portion paid, for it is a debt. Ch. R. 146.

So the wife cannot claim jewels, &c. as her paraphernalia, where her husband has devised them by his will. Semb. Cro. Car. 346. 1 Rol. 911. l. 50. R. cont. Ca. Ch. 240. Per two J. cont. Jon. 334.

Or disposed by his deed in trust for the wife for life. Semb. 1 Ch. R. 27.

Or makes a jointure or settlement upon his wife, in bar of all demands out of his personal estate. R. 2 Ver. 49. 83. (m)

Yet apparel necessary or convenient the wife shall have against the

on public occasions, are paraphernalia. Ibid. — 9. If a husband pledges a diamond necklace, which his wife has been used to wear, as a collateral security for money borrowed on bond, and gives power to the pawnee to sell it for a sum certain, during his absence, yet this is not a sale, nor does alien it, if not sold in his life, and it only stands as a pledge. Ibid. — 10. If husband pawns his wife's paraphernalia and dies, leaving sufficient to redeem, and pay all his debts, she is entitled to have it redeemed out of his personal estate. Ibid.

(l) 1. 2 Atk. 104. — 2. The wife shall not have her paraphernalia, if there was not a sufficiency to pay the testators debts at the time of his death, though sufficient property which was at that time contingent afterwards falls in. 2 P. Wms. 80. — 3. At least she shall have no recompence out of that property for her paraphernalia, if they were applied to the payment of debts before the contingency upon which the falling in of the property rested took place. Ibid. — 4. Where a wife cannot have her paraphernalia, on account of debts, she cannot have dowry money. Semb. Ibid. — 5. Although where the husband dies indebted, the widow cannot have her paraphernalia at law, yet equity will direct that she shall stand in the place of specialty creditors as to the real assets. 3 Atk. 369. — 6. If simple contract creditors are not satisfied out of the personal estate, nor by standing in the place of specialty creditors out of the real estate, the paraphernalia shall be applied to make good the deficiency, but not to legatees. Ibid. — 7. Or for payment of debts and legacies. Semb. Cro. Car. 346. Court divided. Jon. 333. Ch. R. 146.

(m) 1. A husband cannot devise the paraphernalia, and if he do, the court will decree them to the wife, and give costs out of the husband's estate. 3 Atk. 217. — 2. But the husband may alien them during his life-time. 3 Atk. 394. — 3. The husband by will gave his wife 10,000*l.* on condition that she should give up her right of dower, and devised to her all her wearing apparel, ornaments of her person, her gold watch and jewels, except some round a picture, and devised the residue of his estate to A., and then by codicil revoked the devise of his jewels and her pearl necklace, which he gave to B., and by another codicil gave his wife a pair of diamond ear-rings; it was decreed, that she should have her paraphernalia notwithstanding. 3 Atk. 358. — 4. But if a freeman's wife, before marriage is expressly barred of every thing she can claim, by common law, custom of London, or otherwise, she has no right to paraphernalia; and though her husband, by will, leaves her her jewels and personal ornaments of every kind, she cannot have them, for he could dispose of only half his personal estate. 2 Atk. 642. — 5. So if a wife does not claim her paraphernalia, her executor or administrator after her death cannot claim them. 2 Ver. 246.

devise of the husband; for she ought not to be naked, or exposed to shame or cold. R. 1 Rol. 911. l. 55.

So against the creditors of the husband. Sembl. 120. 216. (n)

(G) What acts by the husband and wife bind the wife.

(G 1.) Alienation by fine.

If husband and wife(o) levy a fine of the freehold(p) or inheritance(q) of the wife, she shall be thereby barred for ever; because she shall be examined by the justices upon the fine. Co. L. 353. b. 1 Rol. 347. l. 17.

So if they levy a fine of land which they have jointly.

Though they are afterwards divorced *a vinculo*. 2 Rol. 20. l. 30. Mo. 477.

So if the husband and wife sell the land of the wife, and afterwards levy a fine to the vendee. 2 Co. 57.

So a fine by husband and wife binds the wife though the uses are declared by the husband alone; for the assent of the wife shall be intended, if her assent does not appear. R. 2 Co. 57. 2 Rol. 798. l. 10. 25.

Though the wife was within age at the time of the declaration of uses. 2 Rol. 798. l. 13.

So if they both join in declaring the uses to a mortgagee, the husband alone may afterwards declare the nature of the agreement, to shew that it was not usurious, though the wife dissent. R. 2 Rol. 798. l. 30.

So if the wife declare the uses without her husband, it will be void. R. Skin. 275.

If the deed, by which the uses are declared, be made between the husband and the wife only, whereby it can only be a deed-poll, yet it is sufficient to declare the uses of the fine. D. 4 Mod. 264. Vide Uses, (D 1.)

(n) 1. Where there are real estates descended, the wife may be entitled to her paraphernalia, and stand in the place of bond creditors, but otherwise when the real estates come by the husband. 1 Atk. 440. — 2. Where there is no trust on real estate for payment of debts, the wife cannot stand in the place of creditors, nor come on it at all events to be satisfied her paraphernalia. 2 Atk. 104.

(o) 1. A fine may be acknowledged *de bene esse*, by a feme covert, without her husband when he has previously acknowledged it, and is abroad. 2 Blk. 1205. — 2. A feme covert, whose estate has been regularly sold, will not be prevented levying a fine thereof, from her husband having since become *non compos*. 1 N. R. 312. — 3. The court will not permit a fine by a feme covert to pass, though her husband, declared a bankrupt, has absconded and gone abroad. 1 Taunt. 37. — 4. The most scrupulous adherence to the prescribed form of the caption of the acknowledgment of a recovery by a feme covert, is requisite. 5 Taunt. 661.

(p) Quære whether an agreement by a husband for a lease of part of his wife's term, will bind her after his death, as an actual lease does; and if so, whether the rent is his property, or survives to her with the reversion. 6 Ves. 385.

(q) Where trustees are interposed, the court will not authorize a married woman's parting with her life-interest in a sum of money upon examination on a fine at law. 1 B. C. C. 518.

But a fine by husband and wife, where no uses are declared, will be to the use of the wife only. R. 2 Co. 58. b. Mo. 197.

If the husband declares the uses of the fine, and the wife makes a contrary declaration, the uses by each of them are void. R. 2 Co. 57. Mp. 197.

So if they differ in the declaration of the uses, though they agree as to some uses, the declaration is void for the whole. R. 2 Co. 58.

So if an indenture be prepared by both to declare the uses, and the husband executes, but the wife refuses, the uses are void, though the wife does not make a contrary declaration, and though her dissent does not appear by the deed. R. 2 Rol. 798. l. 20.

So if there was a fine by husband and wife when the wife was within age, it may be avoided during her nonage, by error.

Or upon examination, it may be vacated by the court *quoad* the wife, without a writ of error. R. 3 Lev. 36.

(G 2.) By common recovery.

So if a common recovery is suffered by husband and wife (*r*) of the wife's lands, this is a bar to the wife; for she ought to be examined upon the recovery. Pl. Com. 514. a. 10 Co. 43. a. 1 Rol. 347. l. 19. Vide in Recovery, (B 1.)

So if husband and wife are vouches in a common recovery, the recovery shall be a bar, though the wife be not examined; for though it be proper that she be examined, yet that is not necessary, and is frequently omitted. D. 1 Sid. 11. Per Rolle, Sti. 319. 320.

But where husband and wife are jointly seised in tail, a common recovery against the husband alone is void for the whole. R. 3 Co. 5. a. Mo. 210.

So if the husband alone come in as vouchee. Semb. 3 Co. 6. b.

So if the husband and wife are jointly seised for life, and to the husband in tail, a recovery upon a *præcipe* against the husband alone is void for the whole. R. 3 Co. 5. 2 Rol. 395. l. 30.

Though the husband afterwards survive, and the wife had a voidable estate. R. 3 Co. 5.

Yet, if the husband alone comes in as vouchee, it is good, except as to the wife. R. 3 Co. 6. a. 2 Rol. 395. l. 35.

So a recovery of the wife's inheritance, where the husband bargains and sells it, and the remainder-man is vouchee, is a bar to the remainders, though not to the wife. 2 Rol. 394. l. 10.

So where husband and wife have for life before coverture, and to the husband in tail, a recovery upon a *præcipe* against the husband alone is good for a moiety. R. Mo. 95.

(G 3.) By demise.

So by the st. 32 H. 8. 28. leases by any of full age, seised in right of his wife, or jointly with his wife, of any estate of inheritance, made

(*r*) 1. A feme covert cannot suffer a recovery without her husband, though as a joint-tenant with others. 1 Taunt. 478. — 2. And since a recovery suffered by a feme covert will not be amended by adding the name of her husband, when suffered with others, the court will strike her name out of the writs and process, and allow the recovery to pass as to the others; whereupon she may suffer one separately. 1 Taunt. 478.

before coverture, or after, being by writing indented under seal, shall be good against the lessor, his wife, and their heirs, and every of them. Vide in Estates, (B 32.—G 4, 5.)

Not to extend to leases of lands, &c. in farm by virtue of any old lease, unless the same be expired, surrendered, or ended within one year after such lease.

Nor to a grant of any reversion.

Nor to leases of land, not most commonly letten by the space of twenty years next before such lease.

Nor to leases without impeachment of waste.

Nor to leases for more than twenty-one years, or three lives from the day of making.

And that on every such lease be reserved yearly during the lease, payable to the lessors, and those to whom the reversion shall belong, the most accustomable rent paid for the same lands, within twenty years next before such lease.

And that the wife be made party to the lease, by any husband of the inheritance of his wife, and such lease shall be by indenture, in the name of the husband and wife, and she to seal the same; and the rent shall be reserved to the husband and wife, and the heirs of the wife, according to her estate.

And therefore, a demise by husband and wife, by indenture under their hands and seals, of the land of the wife in possession usually demised, if it be for three lives, or twenty-one years, or a less estate, rendering the usual rent during the term, to the husband and wife, and the heirs of the wife, and not dishonourable of waste, shall be good against the wife and her heirs.

So a demise by husband and wife, by indenture for three lives, *habendum* after Michaelmas, and they make livery after Michaelmas, is good; for the lease does not take effect by the livery without deed, but by the deed and livery together. R. 2 Cro. 563.

So a demise by indenture by the husband alone, (his wife not being a party,) where they are jointly seised, shall be good against the wife within the st. 32 H. 8. 28., for the proviso, which requires the wife to be party, extends only to a lease of land, of the inheritance of the wife. Scmb. per three J. Hob. cont. Cro. Car. 22.

So a demise by husband and wife, pursuant to the statute, will be good, though the wife be an infant; for the statute says only, if any of full age seised in right of his wife. 3 Leo. 133.

So a demise by husband and wife for sixty years, if they so long live, is good within the statute. Adm. Cro. Car. 22.

So a demise by deed by husband and wife, of the land of the wife, not pursuant to the statute, is a good demise of both during the coverture, and may be pleaded as their demise. R. 2 Co. 61. b. 3 Co. 16. 21. b. Sav. 110.

So if there be a demise for years, with a letter of attorney, signed by both, to deliver the lease upon the land; though the wife cannot make an attorney. Cont. per three J. 2 Cro. 617. R. per three J. cont. Yel. 1. R. acc. Cro. Car. 165. R. acc. 2 Leo. 200.

So, though there be a demise by them, without reservation of any rent. R. Hut. 102.

So if there be a demise by husband and wife, by indenture, for years, of a moiety of land, which they have jointly with B. and B. survive, he

he shall not have this land by survivor; for it shall be the lease of the wife till her disagreement, and there was a severance during the term. R. 2 Rol. 89. l. 20. 2 Cro. 417. 1 Rol. 401. 441. 3 Bul. 272. Bridg. 42.

•But a lease by husband and wife, not conformable to the statute, may be waived, or affirmed by the wife after the death of the husband. 1 Rol. 349. l. 11. Vide post, (R,—S 1, &c.).

And a lease by them without deed, is void as to the wife. Sav. 111. R. Dy. 91. b. R. Cro. El. 656.

And it cannot be affirmed by her assent, after the death of her husband; for her consent, at the commencement of the lease, ought to appear by deed. Dy. 91. b. 146. b. 1 Leo. 204.

And if it be waived, it will be void as to the wife *ab initio*, and she may plead *non dimiserunt*. R. 3 Co. 27. b. Co. Ent. 712. R. 1 Leo. 192.

Yet, if a man plead demise by husband and wife, he need not plead it to be by deed. R. 2, Co. 61. b. D. 3, Co. 16. 21. b. Sav. 111. D. Dy. 91. b. in marg. R. Cro. El. 438. 481, 2.

Or, that any rent was reserved. R. Cro. El. 112.

And a lease by husband and wife without deed, may be pleaded as a lease of both, during the coverture. D. Cro. El. 438.

(G 4.) By customary conveyance.

By the custom in some cities and boroughs, a bargain and sale by the husband and wife, where the wife is examined by the mayor, or other officer, binds the wife after the husband's death. 2 Inst. 673.

And by the st. 34 H. 8. 22. all such customary conveyances shall be of force, notwithstanding the st. 32 H. 8. 28.

So, by custom in Denbigh in Wales, a surrender by husband and wife, where the wife is examined in court there, binds the wife and her heirs, as a fine does; and this custom is not toll'd by the st. 27 H. 8. 26. for it is reasonable, and agreeable to some customs in England. Per two J. Southcote cont. Dy. 363. b.

So, a surrender of a copyhold by husband and wife(s), the wife being examined by the steward, binds the wife. Adm. Litt. 274. Vide in Copyhold, (F 7.)

(H) What acts by the husband and wife do not bind the wife.

But generally, the wife shall not be bound by any act, to convey her inheritance or freehold, unless she be examined. D. 10 Co. 42. b. 1 Rol. 347. P.

(s) 1. *Quære*, whether a copyhold will pass by the surrender of a feme covert, empowered under deeds of separation to dispose of her estate. 2 B. C. C. 377. — 2. Husband under the circumstances decreed to procure his wife to join in a surrender of copyhold estate. 7 Ves. 474. — 3. If the husband covenants that his wife shall enjoy certain copyholds which descend upon her to her own use, and that he will join in surrendering them, she may surrender them alone. 1 H. B. 334. — 4. And without any covenant, her surrender will bar her. Ibid. — 5. And her heirs. Ibid. — 6. And can only be avoided by her husband. Ibid.

And she can be examined only upon writ. 10 Co. 42. b.

And therefore, if husband and wife convey by deed, acknowledged by them to be inrolled, it does not bind the wife; for there was no writ depending, upon which she might be examined. 10 Co. 43. a. 2 Inst. 673.

So, if husband and wife acknowledge a statute and recognizance, it does not bind the wife. R. 10 Co. 43. a. (t)

(I 1.) What acts by the husband alone bind his wife.

Chattels personal (u), which are vested in the husband by the marriage, he may absolutely dispose of without his wife; and if he does not dispose of them, they go to his executor or administrator. Vide ante, (E 3.)

So, chattels real, which he has in right of his wife, or jointly with his wife, he may dispose of, or forfeit, and the disposition binds his wife. Vide ante, (E 2.) (x)

So, if the husband be seised in right of his wife for life, and make a feoffment; it will be a forfeiture during the coverture. 1 Rol. 851. l. 47.

So, if the husband and wife join (y) in the feoffment, or were joint-tenants. 1 Rol. 851. l. 45. 50.

So, if a lessee for years assign his term to A. and the wife of his lessor, and the husband afterwards make a feoffment of the estate, the term which he had in right of his wife passes. Pl. Com. 419. Mo. 171.

So, if the husband bargain and sell the land by indenture inrolled. Mo. 171.

So, a right which by possibility may accrue to the wife during the coverture, the husband may discharge by his release. Per Holt, 1 Sal. 326.

(I 2.) What put her to her action.

So, by the common law, if an husband seised in the right of his wife, in fee or in tail, had made a feoffment to another without his wife, this would have been a discontinuance, and could not have been defeated by the entry of the wife after his death. Lit. s. 594. Vide Discontinuance, (A 3.)

So, if the husband was jointly seised with his wife. Co. Lit. 326. a.

So, a fine by the husband alone, of land which he had in right of his wife, or jointly with his wife, would have been a discontinuance. Co. L. 326. a.

(t) If money or stock is settled to be laid out in land, husband and wife cannot by contract or deed alter the nature of it to make it personal estate; but it must be invested in land, and then by fine she may give it her husband, or by coming into equity she may be examined and consent it shall be taken as personal estate. 2 Atk. 452.

(u) Right of husband to release the orphanage share of his wife, a freeman's daughter. 1 Eden. 64.

(x) A man possessed of a term of years in right of his wife, as executrix of her former husband, has power to grant and convey the same. 3 Wils. 277. 2 Blk. 801.

(y) The inference from a demand made or discharge given by the husband, seised in right of his wife as for rent due to him, is, that he alone demised, and not jointly with his wife. 2 Taunt. 180.

So,

So, if the husband alone makes a gift in tail, rendering rent, and afterwards the husband and wife levy a fine of the reversion, and the husband dies, the wife shall be barred of her entry upon the donee. R. Mo. 91.

(I 3.) *Cui in vitâ.*

And by the common law, upon such a discontinuance, the wife had no remedy but by *cui in vitâ*, which lies, where the husband aliens an estate, of which his wife was seised for life, in tail, or in fee. F. N. B. 193. a.

If the wife was seised in fee, and dies before the husband, the heir of the wife shall have a *sur cui in vita*. F. N. B. 193. a.

(K) *What acts by the husband alone do not bind his wife.*

By the st. 32 H. 8. 28, &c.

But now, by the st. 32 H. 8. 28. no fine, feoffment, or other act by the husband only of lands, the inheritance or freehold of the wife, shall be a discontinuance, or prejudice the (z) entry of her, her heirs, or such as have a right after her death.

And, therefore, if the husband alone levy a fine of the wife's land, it is no discontinuance, but the wife, or her heir, may enter.

So, if a common recovery be suffered upon a *præcipe* against the husband and wife. Co. L. 326. a.

Though the fine or feoffment, &c. be to the use of the king. R. 2 Inst. 681.

So, a feoffment by husband and wife, of the land of the wife, is no discontinuance; for though the wife joins, it is the feoffment of the husband alone. Co. L. 326. a.

So, a fine, feoffment, &c. by the husband alone, of lands, which he has jointly with his wife, is no discontinuance by this statute, any more than of land, being the inheritance, or freehold of the wife. Co. L. 326. a. 2 Inst. 681. R. 8 Co. 72. a. R. Mo. 28.

But a fine in such a case, if they are seised to them, and the heirs of their bodies, is a bar to the issue; and the estate of the wife is changed to an estate for life, without impeachment of waste. 2 Inst. 681, 2. Dub. Mo. 28.

(z) 1. Husband's assignment of wife's property will not bar her equity. 4 B. C. C. 326. — 2. As to the effect of an assignment for valuable consideration by a husband of his wife's equitable interest, with reference to her equity for a provision, *quære*. 11 Ves. 20. — 3. Assignment by a husband of part of his wife's equitable interest, viz. dividends of stock in trust for her, for valuable consideration, enforced upon the bill of a surety for the husband to be indemnified against past and future payments; the assignment extending only to 100*l.* a year, out of 260*l.* The remaining dividends under a bill on behalf of the wife, paid to her; the husband having, after the assignment, gone abroad, without making any provision for her. 11 Ves. 12. — 4. Where a husband assigns the wife's property for a valuable consideration, *quære*, whether the assignee does not take it subject to the same equity to which it was subject at the time of the husband's assignment. 2 Cox. 422. — 5. Wife held to be entitled to a provision against the particular assignee of the husband, for valuable consideration, of the whole of her equitable interest. 1 Eden. 370. Vide 9 Ves. 100.

So, a fine, &c. by the husband alone, where he was seised in right of his wife, or jointly with his wife only for life, is not a forfeiture to bind the wife, after the death of her husband. 1 Rol. 851. l. 52. Vide 1 Rol. 852. l. 5.

If there be a feoffment by the husband alone, and he and his wife are afterwards divorced *a vinculo*; yet the wife may enter without a *cui ante divortium*; for at the time she was his wife *de facto*. Co. L. 326. a.

If there be a feoffment, &c. by the husband alone, of the land of his wife, by this statute, after the death of the husband, the wife, or her heir, may enter. Co. L. 326. a. Hob. 261.

If the husband and wife were jointly seised, the heir of their bodies may enter. Co. L. 326. a. R. 8 Co. 72. a.

So, if the wife die without issue before entry, he in reversion or remainder, may enter. Co. L. 326. a. Jon. 324. Cro. Car. 321. R. Hob. 261.

So, if an husband seised in tail, remainder to his wife in tail, make a feoffment alone, and die without issue, his wife in the remainder may enter. Co. L. 326. a.

But the fine, feoffment, &c. binds the wife during the coverture.

So, if the husband and wife are jointly seised in tail, and the husband alone makes a feoffment, &c. and his wife dies before him, the issue shall not enter during the life of the husband. Co. L. 326. a. Hob. 261.

Nor, if the husband was seised in right of his wife, and had issue. Co. L. 326. a.

So, if the wife before entry levy a fine, she cannot afterwards enter; for the discontinuance continues till entry, which is now barred by the fine. R. 2 Rol. 311. Vide Discontinuance, (A 3.)

So, if husband and wife for life, and to the heirs of the body of the husband, remainder over, join in a fine, and the wife survives, the entry of the wife being barred by the fine, the entry of those in remainder is also barred. R. Cro. Car. 321. Jon. 324.

So, if the wife die without an heir, after a discontinuance by her husband, entry is not given to the lord by escheat. Hob. 261.

So, a thing to take effect for the wife after the death of her husband, the husband cannot discharge in his life-time; as, if there be a promise to the wife to pay so much, if she marries B., and afterwards survives; the husband by his release cannot discharge such promise. R. 1 Rol. 343. l. 50. 2 Rol. 407. l. 45. Yel. 156. 2 Cro. 222. 1 Brownl. 15. 1 Sal. 327. Pul. 99. Vide ante, (D 1.)

Otherwise, if there are express words. Vide 1 Rol. 343. l. 50. R. Yel. 156.

So, if a term be granted to husband and wife for life, and afterwards to the executor of the survivor, the husband cannot grant this possibility of the executor. Vide ante, (E 2.) (a)

If the wife has an annuity for life, a release by the husband does not bind his wife, if she survives. R. Mo. 522.

If a man has a copyhold, in which his wife by custom has her free bench, and the husband agrees that A. shall enjoy during the lives of

(a) Vide 16 Vcs. 122. 1 V. & B. 405.

himself and his wife; this does not bind his wife. R. 2 Ver. 45. 63. (b)

(L) What laches of the husband prejudices his wife.

* If an express condition be annexed to the estate of a woman, who takes husband, the laches of the husband to perform the condition, loses the estate for ever. Co. L. 246. b.

As, if there be a feoffment to the wife, before or after coverture, rendering rent, upon condition to be void for non-payment of the rent; if the husband does not pay the rent, the estate is lost. Co. L. 246. b.

So, if there be a condition, that the rent, for non-payment at the day, shall be double. Co. L. 246. b.

So the laches of a husband, to perform a condition in law which requires skill; as, if a woman has the office of parker, steward, &c. who takes husband, neglect to keep the park, &c. by the husband, will be a forfeiture. Co. L. 233. b.

So, if a woman has a right to land, and takes husband, the laches of the husband to make claim binds the wife; as, if tenant for life, remainder to a woman, levy a fine, and the woman takes husband, who does not enter within five years after the fine, the wife shall be bound by the fine and non-claim. R. Dy. 159. a. in marg.

(M) What not.

But the laches of the husband to perform a condition in law, which does not require skill or confidence, does not prejudice his wife. Co. L. 233. b.

As, if the wife be tenant for life, or for years, and her husband make a feoffment, &c. the forfeiture does not bind his wife. Co. L. 233. b.

(N) What acts of the wife prejudice the husband.

So, the husband shall be charged for all debts of his wife *dum sola*. 1 Rol. 321. l. 25. 3 Mod. 186. (c)

(2) 1. A surrender of copyhold to husband and wife and the survivor, and after the death of the survivor, to the right heirs of both, vests an immediate fee-simple in the husband and wife by entireties, and the husband cannot alien or devise any part of it, but the whole will, on his decease survive to the wife. 2 Blk. 1211. — 2. Though a devise to A. & B. who are strangers to, and have no connection with each other, creates a joint-tenancy, the conveyance by one of whom severs the joint-tenancy and passes a moiety; yet the devise is to the husband and wife, they take by entireties, and not by moieties; and the husband alone cannot, by his own conveyance, without joining his wife, divest her estate. 5 T. R. 634. — 3. Where a mortgagee devises to husband and wife in fee, treating the property as real estate, it survives to the wife against the husband's sole conveyance. 6 T. R. 652.

(c) 1. Though she bring him no portion. 3 P. Wms. 409. C. T. T. 173. — 2. But a man marrying a widow is not bound to maintain her children by her former husband. 4 T. R. 118. 4 East, 76. — 3. Unless he holds them out to the world as part of his own family. 3 Esp. 1. — 4. If infant marries a woman of full age, he is liable to her debts, and arrests for them. Barnes, 95.

So,

So, if a woman executrix, or administratrix, commits a *devastavit*, and then takes husband, the husband, during the coverture, shall be charged for it. R. Cro. Car. 603. R. Mod. 761. Vide Administration (D). Vide post, (2 B—2 C). (d)

(C) The power of the husband during the coverture.

The husband, during the coverture, may take the rents and profits of the whole estate of his wife.

If there be a lease by the wife *dum sola*, payment of the rent ought to be to the husband; and payment to the wife without the husband's order, though there be no notice of the marriage, shall not discharge the lessee. R. Pal. 210.

So, he has the sole disposition of all interests of his wife: and therefore, if the next avoidance be granted to husband and wife, the husband alone may present. Lit. s. 13.

For an interest which vests in the wife, or accrues to her during coverture, he may sue alone, or with his wife. Vide post, (X).

If a legacy be given to the wife, the husband alone may take or release it. 1 Sal. 115.

Though the wife was divorced *a mensa et thoro*; for they continue husband and wife. 1 Sal. 115. 1 Rol. 426.

So, if the wife, after a divorce *a mensa et thoro*, or before, sues another woman for incontinency with her husband, and recovers costs against her, the husband may release them; and if the wife afterwards proceed for them in the spiritual court, a prohibition shall go. R. 1 Sal. 115. 5 Mod. 70.

But if upon a divorce *a mensa et thoro*, the wife be allowed alimony, and afterwards sues in the spiritual court for injury or defamation, and costs are recovered, the husband cannot release them; for they come in lieu of what she spent out of her alimony, or separate maintenance. R. 1 Sal. 115. 5 Mod. 71. R. 1 Rol. 426.

If the wife squanders his estate, or goes into lewd company, he may deprive her of liberty; otherwise, not. Str. 478. (e)

(d) 1. Where a wife has executed a deed without her husband's authority, any claim which the other party has against him arises out of an implied simple contract, of the terms of which the deed, though void, may be used as evidence. 6 T. R. 176. — 2. If there be a recovery in ejectment against the wife, the judgment will not be evidence against the husband and wife, in an action for mesne profits; since the wife's confession of a trespass committed by her, cannot affect her husband in an action in which he is liable for the damages and costs. 7 T. R. 112. — 3. A *distringas* against the husband abroad will be set aside, where, as well the debt was contracted by the wife as the action was commenced after his departure. 1 Taunt. 485. — 4. In the absence of fraud, the court will set aside a *distringas* against the husband abroad, under which property in the wife's possession has been taken. 3 Taunt. 145.

(e) 1. And in all proper cases, he may use necessary coercion. 3 Burr. 1622. — 2. But the court will not deliver a wife out of the hands of her friends, into the custody of her husband, where it is clear that he has used her ill, and she actually swears the peace against him. 4 Burr. 1991. — 3. And the husband has no controul over the person of his wife separated from him by agreement. 13 East, 173. 1 Burr. 542.

(P) What acts a feme covert may do without her husband.

(P 1.) Alien her estate.

If a feme covert levy a fine of her lands (*f*) without her husband, this bars him and his (*g*) heirs, if it be not avoided by her husband. 10 Co. 43 a. 1 Rol. 346. l. 50. 1 Leo. 82. Adm. Jon. 138.

So, if she suffer a common recovery, it is a bar till it be avoided. Dub. 1 Rol. 347. l. 1.

So, if an estate be given to a feme covert, upon condition that she enfeoff another, she, for the saving of the condition, may make a feoffment to the other, during coverture. Jon. 137, 138.

So, if she has power to dispose, she may execute her power by conveyance. Jon. 137. (*h*)

But, if a feme covert grant (*i*) a rent-charge, without assent of her husband, out of her lands, it will be totally void. Perk. Grant, 6. Vide post, (Q).

So, if she grant an annuity by deed. Perk. Grant, 6. (*k*)

Though the rent-charge be granted out of land assigned to the wife by the husband, for her several maintenance. Perk. Grant, 8.

So a feoffment, by a feme covert without her husband, is void; for she cannot make livery. Adm. Jon. 138. Lat. 41.

Though it be in execution of a trust; for it ought to be done by her and her husband. Jon. 137, 8. Semb. cont. by the other Judges in the case of a trust. Jon. 137, 8. Lat. 40. (*l*)

(P 2.) Accept an estate.

So, if a feme covert purchase (*m*) lands without the consent of her husband, the conveyance is good, till it be avoided by her husband. Co. L. 3. a. (*n*)

(*f*) A feme covert is to be considered as sole, in regard to her separate property. 2 Ves. 190. 1 B. C. C. 20. 1 Ves. J. 42. 189. 13 Ves. 190. 16 Ves. 125. 18 Ves. 434.

(*g*) And her own. 1 H. Bl. 341.

(*h*) But the deed will only operate as an appointment, and not as a deed.

(*i*) Agreement by wife, without knowledge of husband, to pay additional rent out of her separate property, good. 1 Ves. J. 515.

(*k*) Grant of an annuity by a married woman out of her separate property established; notwithstanding notice to the plaintiff by the trustees, that they would pay to herself only, on account of complaints of her husband's conduct, in consequence of her refusing to join him in raising money; the transaction, though for the benefit of the husband, upon the evidence being her deliberate act, aware of what she was doing, and a free agent. 14 Ves. 542.

(*l*) Trust to permit a married woman to receive the interest or dividends of stock stock to her own use, during her life, independent of her husband. She is absolutely entitled for life to her separate use; and upon the rule, that a feme covert is to be considered sole as to her separate property, her assignment to secure an annuity with her husband, was established. 9 Ves. 520.

(*m*) A bond may be given to a feme covert either alone, or jointly with her husband. Vide 2 Snow. 247. pl. 249. 3 H. 6. 23. b.

(*n*) So the assignment of a lease to a feme covert is good until the husband dissents. Dougl. 435 p. C.

And therefore, if a feoffment, or demise for life, &c. with livery be made to a feme covert without her husband, the estate is vested in the wife before the agreement of the husband. Co. L. 356. b.

So, if a feme covert make an actual entry by wrong, it will be a disseisin, and the estate vests in her. 1 Rol. 660. l. 33. Co. L. 357. b. Vide post, (Q).

But the husband, by his disagreement, divests the whole estate out of his wife. Co. L. 3. a.

So, if the husband alien the land of his wife, and the alienee afterwards make a gift or demise to the husband and his wife for life; the wife shall be in her remitter to the whole. Lit. s. 666. Vide in Remitter, (A 4.)

Though the demise was by *fine sur render*, or by indenture. Co. L. 353. a.

So, if the husband and wife were jointly seised, and the husband aliens, and the alienee makes a demise to them, it shall be a remitter to both of them. Lit. s. 672.

If there be a feoffment by a woman, upon condition to re-ensfeoff when she pleases; after coverture she may require the feoffment without her husband, and if the feoffee does not perform the condition, it will be broken. 1 Rol. 346. l. 30. (o)

(P 3.) Execute an authority, &c.

So a feme covert may act *en auter droit*, without her husband; as, if she be an executrix, she may administer without the assent of the husband. Perk. Grant 7. Vide in Administration, (D.)

If she has an authority to sell, &c. she may do it without (p) her husband. Co. L. 112. a. 1 Rol. 329. l. 26. (q)

So, if there be a devise to a feme covert, with a power to dispose to any of her sons, she may, by feoffment, &c. dispose the inheritance to her son, without the husband. R. Jon. 137, 8. Lat. 139.

So, if there be a devise to the wife in fee, upon condition that she dispose. R. Jon. 137, 8. Lat. 139.

But a devise to the wife in fee, upon trust to convey to another; if she conveys by feoffment without her husband, it will be void. Dub. Jon. 138.

So the queen consort may grant, and take, sue, and be sued, without the king. Co. L. 133. a. Vide in Roy, (F 1.)

(o) To an avowry for rent in arrear, the plaintiff pleads in bar, "that before, and at the time of the supposed demise, and when the supposed rent became due, she was married to one J. C." Held, that whether it were to be presumed that the coverture continued up to the time when the distress was taken, or not, the plea was no answer to the avowry. 2 Mars. 386. 7 Taunt. 72.

(p) 1. And she may even sell to him. 1 H. Bl. 346. — 2. Vide 2 Anst. 363. 1 Cox, 357.

(q) 1. A custom that the separate examination of a married woman to enable her to surrender her copyhold shall be before two customary tenants, is good. Where there is no custom it must be by the steward of the manor. 4 Taunt. 294. — 2. If the husband covenants that his wife shall enjoy certain copyholds which descend upon her to her own use, and that he will join in surrendering them, she may surrender them alone. 1 H. Bl. 334. — 3. And without any covenant her surrender will bar her. Per Ld. L. 1 H. Bl. 341, 2, 3. — 4. And her heirs. Ibid. — 5. And can only be avoided by her husband. Ibid.

So,

So, by the custom of London, a feme covert may be a sole trader. Sho. 184. *Vide ante*, (A 2).

So a disposition by the wife, pursuant to an agreement by the husband before coverture, will be good. *Vide in Chancery*, (2 M 11. 14.)

(Q) What not.

Cannot make a contract, &c.

But generally, (*r*) a feme covert has no power to make a contract, (*s*) without (*t*) her husband: and therefore, such contract is absolutely void. R. by all the judges, 1 Sid. 120. (*u*)

And if the wife sell, or dispose of the money, or goods of the husband, without his assent, the sale is void, and the husband may have trover, &c. for the goods. (*x*)

So, if a wife loses at cards, &c. the husband may maintain trover for the money. R. 1 Sid. 122.

So, if a wife buy goods, &c. without the assent of her husband, the husband is not chargeable for them. Per three J. 4 Leo. 42.

Though they were for necessary diet, or apparel: as, bread, &c.

And he is not chargeable in trover, or account, any more than in assumpsit. 1 Rol. 346. M. R. 1 Sid. 129.

So, if a wife buys necessities, but pawns them before using. 1 Sal. 118.

(*r*) 1. The covenant of a feme covert, having a power over her separate estate, is binding upon her. 1 B. & B. 49. *Vide* 1 Mad. 258. 4 B. C. C. 19. — 2. And a married woman, separated from her husband, and having a separate maintenance, renders the same liable by accepting a bill of exchange. 3 Mad. 387.

(*s*) 1. Hence cannot indorse a bill or note. Str. 516. — 2. Unless as agent to her husband and in his name. 1 East, 432.

(*t*) 1. *Supra*. — 2. The wife's bond given jointly with her husband, shall bind her separate property. 1 B. C. C. 16. — 3. But when a married woman stipulates, that in the event of her surviving, the property shall be her's, reserving no power of disposition over it during the coverture, there are no means by which she can dispose of it while covert. 1 V. & B. 123. — 4. So under a settlement in trust to pay the rents and interest to the separate use for the joint lives of husband and wife; if she survived, for her heirs and executors; if he survived, according to her appointment by will; in default thereof, a limitation over as to the real estate; and as to the personal, to her executors; the wife cannot, during the coverture, bind the capital surviving to her. 1 V. & B. 119. — 5. And as to the effect of her subsequent undertaking, when sole, to pay her bond given during coverture, the creditor was left to law. *Ibid*.

(*u*) 1. A feme covert cannot of herself discharge an obligor from the payment of an annuity due to her on his bond given to the husband during coverture. 5 East, 351. — 2. And if a bill be made payable to a feme covert though her husband permit to trade as a feme sole, the right to transfer it is in the husband, not in the wife, unless perhaps as his agent, and even then only in his name. 1 East, 432. — 3. So the owner of goods hired out to a married woman, separated from her husband, is not divested during the term, of the present property therein, since the contract of hiring was void. 15 East, 607. — 4. And where a married woman without her husband's knowledge, and without disclosing that she is married, rents a tenement; the landlord, on discovering her situation, may repudiate the contract. 4 M. & S. 357. — 5. So a feme covert cannot make an attorney. 3 Taunt. 261.

(*x*) Or the produce of the property converted. 8 Ves. 599.

So, if a wife be arrested and committed to prison, the husband shall not be charged for her diet, or lodging there, if he never assents, that she shall have it. R. 2 Lev. 16.

Yet, if the goods come to the use of the husband, this is a proof of his assent, and he shall be charged.

So, if goods come to the use of the wife, or the children, or family of the husband, and his assent precedent or subsequent be proved, he shall be charged. 1 Rol. 350. E. R. by all the judges, 1 Sid. 120.

So, if they come to the house of the husband, and are used there, it is good evidence to charge the husband, without more. R. 1 Sid. 121, 126. Per Treby, Skin. 349.

So, if the wife be generally allowed by the husband to be housekeeper, or to buy for him, her contract charges the husband. R. 1 Sid. 128.

So, if a wife buy necessary (y) apparel for herself, the assent of the husband

(y) 1. The rule touching the husband's liability to pay for necessities furnished to his wife, is the following: — If the wife has been obliged, by her husband's misconduct, to take up necessary things on credit, he must pay for them, though he may previously have warned the tradesmen not to trust her. But if her own misbehaviour has reduced her to want, he cannot be charged, unless the things furnished, being other than the necessities of life, are not sent back when he has it in his power to return them, even though he may not then be living with her. Vide 1 Camp. 120 — 2. In regard to the question, what misconduct by the husband warrants the wife taking up necessities; examples of such misconduct are, neglecting to provide the wife with necessities. — 3. Turning her out of doors. Str. 1214. 4 Esp. 41. — 4. Or obliging her by ill-treatment to quit the house. 1 P. Wms. 482. 1 Esp. 441. 4 Esp. 41. Vide 3 Taunt. 421. — 5. She not having in either case committed adultery. — 6. Refusing to receive her back after she has left him. Str. 875. — 7. Unless with an adulterer. 6 T. R. 603. — 8. In the three first cases he will be liable for all the necessities supplied to her; in the latter case, for those taken up after his refusal. — 9. And though a wife has committed adultery, yet if the husband receives her again, he is liable for necessities lawfully supplied to her after their re-union. 4 Esp. 41. Vide 1 B. & P. 226. 6 Mod. 171. — 10. In regard to the question, *in what do necessities consist?* The term "necessaries" is not confined to merely the necessities of life, but includes, for example, such ornaments and superfluities of dress as are usually worn by women of the wife's rank and station, or rather in the station in which she is permitted by the husband to hold herself out. If she assumes a false appearance, without his permission, a tradesman trusting her upon the faith of that appearance, has no claim upon the husband beyond the extent to which cautious inquiries would have shewn him to be responsible. 1 Camp. 120. — 11. Nor is the term confined to food and raiment; for if a husband turns his wife out of doors, and it becomes necessary for her safety to exhibit articles of the peace against him, he is liable to the attorney she employs for that purpose. 5 Camp. 326. — 12. And since the liability upon a contract depends upon the state of things when concluded, it is immaterial whether the articles taken up are applied by the wife to her own use or not. Sed vide 1 Salk. 118. — 13. Such are the circumstances under which the husband is liable upon his wife's contract. If, however, she misapplies necessities furnished by the husband. — 14. Or squanders the money which he has given her to purchase them. Aleyn, 61. — 15. Or leaves him without a cause. 1 Mod. 124. 1 Sid. 109. Whether with an adulterer or not is immaterial. Str. 875. She has been reduced to want by her own misconduct, and the husband cannot be charged with credit given to her. — 16. So if the husband and wife live separately, and he pays her an adequate allowance for her support, he is not liable for her debts, although the separation is not by deed, and there is no written agreement between them respecting the allowance. 4 Camp. 70. — 17. Indeed formerly it used to be holden, that the husband is liable where the wife lives apart with a separate maintenance unless the creditor has notice of it. Vide 1 d. Rd. 444. Str. 647. 706. 1 Sid. 127. 3 Esp. 250. — 18. But now this doctrine seems to be abandoned. The creditor stands in the wife's place, (11 Mod. 241.) and since she had no right to come upon her husband, the creditor can have none. — 19. If, too, the cre-

husband shall generally be intended. 1 Rol. 351. l. 5. 1 Sal. 118. R. 1 Brownl. 47.

Or, if the wife trades in goods, and buys for her trade, when she cohabits with her husband. 1 Sal. 113.

Or, if she buy necessities, when her husband is beyond sea. R. 1 Sid. 127.

Or, when the husband turns her out of his house. 1 Sal. 118, 119. Before notice, not to give her credit. Per Holt, Skin. 323. Mod. Ca. 171.

Or, when she departs from her husband, if he afterwards receives her. 1 Sal. 119. Mod. Ca. 171.

But where the husband countermands the power to his wife, her contract afterwards does not charge him. 1 Sid. 129.

So, if he prohibits a particular person to sell to her. R. 1 Sid. 127, 8. 1 Lev. 5.

So, if the wife elope, or depart, and do not cohabit with her husband, her contract for necessities does not charge her husband. R. 1 Sid. 129. Skin. 323. Mod. Ca. 171. 1 Sal. 118, 119.

So if she does not cohabit, and has a separate allowance (z), and this be notorious, though no special notice be given to the plaintiff of it. R. 1 Sal. 116. (a)

So, if the wife has a notorious contest with the husband for maintenance, by a public suit, the husband shall not be charged for vestments bought by the wife afterwards. Per Treby, Skin. 349.

So, if the vestments bought are apparently beyond the quality of the husband. Per Treby, Skin. 349.

So, if a wife, who cohabits with her husband, buys vestments without any necessity, of any one warned by the husband not to trust her. 1 Sal. 118.

And if the servant or apprentice be warned, it is sufficient. R. 1 Sal. 118.

ditor, knowing that the wife is a married woman, agrees openly or tacitly to look for payment to her, not the husband, the husband is not liable, though the wife through his neglect, was in want of the articles furnished. 5 Camp. 22. 5 Taunt. 356. — 20. Whether the credit was given to the wife is a question of fact. 5 Taunt. 356. — 21. If so given, the husband is not obliged to return the goods on seeing them in his wife's possession. Ibid. — 22. In a word, to determine whether the husband is liable for things furnished as to his wife, five questions must be asked; Did the woman stand to him in the relation of wife at the time? Was he, when they were furnished, bound to supply her with them? Was she, by misconduct on his part, then in want of them? Were the articles furnished necessities? Was the credit given to the husband, when the wife was known to be a married woman? If these are all answered affirmatively, the husband is liable; if a negative answer is given to any one of them, then it must be asked, whether (unless where the credit was given to the wife) he has adopted the contract? He tacitly adopts it when, having a controul over the goods, he does not return them. 1 Camp. 120. — 23. Where the husband, separated from his wife, suffers their children to reside with her, he is liable for necessities lawfully supplied to her for them. 3 Esp. 252. — 24. He is not bound to maintain her child by a former marriage. 4 T. R. 118. 4 East, 76. Vide 1 Str. 170. — 25. But if he receives it under his roof, and holds it out as part of his family, he will be liable on a contract duly made by her for its education, or the like. 3 Esp. 1.

(z) Having a pension from the crown during pleasure does not release the husband's obligation to furnish necessities. 1 Burr. 2177.

(a) Id. Rd. 444. 12 Mod. 244. Holt, 100.

So, if a wife, after departure from her husband, earn her diet by her labour; the husband shall not be charged for the diet. R. 1 Sal. 118.

So a feme covert cannot be a disseisoress; for if the husband makes a disseisin, to the use of his wife, and she assents, her agreement is void, and it will be the disseisin of the husband alone. 1 Rol. 660. l. 5. 10. &c.

So, if husband and wife make a disseisin, it is the act of the husband. 1 Rol. 660. l. 37.

So, if a stranger make a disseisin to the use of a feme covert, and she assent, her agreement is void. 1 Rol. 660. l. 15.

So, if a feme covert enter, and make a disseisin to the use of her husband, or of a stranger, he is not a disseisor; for the wife cannot dispose of the use to another. 1 Rol. 660. l. 50. 661. l. 1.

So no consent or agreement of the wife to a disseisin precedent or subsequent, can make a feme covert a disseisoress. Co. L. 357. b.

Yet, by an actual entry, and the proper act of the wife, she may be a disseisoress. Co. L. 357. b.

(R) What acts of the husband the wife may waive after his death.

If the husband alone make a feoffment, gift in tail, or demise for life of his wife's land, she, or her heirs, may avoid it by entry after his death. Vide ante, (K).

So, if he levy a fine, or suffer a common recovery of his wife's land. Vide ante, (K).

So, if the husband and wife join in an alienation of the wife's land; unless it be by fine, or recovery. Vide ante, (K).

So, if they join in an alienation of land of which they are joint-tenants. Vide ante, (K).

So, if the husband alone, or with his wife, demise for life, or for years, the freehold of the wife, where it is not warranted by the statute 32 H. 8. 28. the wife, after the death of her husband, may waive it. Vide 1 Leo. 192. Vide ante, (G 3).

So, if the husband seized for life in right of his wife, or jointly with his wife, commit a forfeiture, the wife, after the death of her husband, may avoid it. 1 Rol. 851. l. 52.

So, if a feoffment, gift, or demise be made to husband and wife, the wife may waive it after the death of her husband.

Though the estate be conveyed to them by fine.

So, if an estate be conveyed to the wife, and her husband assent to it, the wife, after his death, may waive it. Co. L. 3. a.

So, the heir of the wife, if she die before agreement, or disagreement to the estate. Co. L. 3. a.

So, if a term for years be granted to husband and wife, she may waive it after the death of her husband. 1 Rol. 349. l. 22.

So, if an obligation or recognizance be made to husband and wife, she may waive it after the death of her husband, and it will be an obligation to the husband alone. 1 Rol. 349. l. 5.

If the wife waives an estate made by them during the coverture, it will

will be the grant, or demise of the husband alone *ab initio*; for her waiver avoids the estate *ab initio*. Sav. 112. 3 Co. 27, 8.

So, if she waives an estate made to them.

(S 1.) What she may affirm by her agreement.

But if husband and wife make a demise for life, or for years, not warranted by the st. 32 H. 8. 28. of the land of the wife, by her agreement to the lease after the death of her husband, it shall be good. 1 Rol. 349. l. 10, 11.

And by such agreement to the lease, she shall have the rent reserved. 1 Rol. 349. l. 10.

And the arrearages incurred in the life of her husband.

And she may have waste, for waste in the life of her husband. Sav. 111.

So a wife, after the death of her husband, may agree to an estate made to her and her husband during the coverture. (b)

(S 2.) The effect of her agreement.

If the wife agree to an estate made to her during the coverture, she shall be liable to all charges to which the estate is subject: as, if the estate was granted by fine, with a render of a rent, she shall be chargeable with the rent. 1 Rol. 349. l. 17.

So, if there be a demise to husband and wife, rendering rent, if the wife agree to the demise, she must pay the rent. 1 Rol. 349. l. 17.

So, she shall be chargeable with the arrearages incurred during the coverture. 1 Rol. 349. l. 20.

So, she shall be charged for waste during the coverture. 2 Inst. 303. 2 Rol. 827. l. 10. 25.

If the estate be granted upon condition, the wife shall be subject to the condition. Dy. 13. b.

So, to the covenant of a lease. Dub. Dy. 13. b.

(S 3.) What shall be an agreement.

If the wife accept rent, reserved upon a lease by her and her husband, after the death of her husband, that amounts to an agreement to the lease. (c)

If the wife enter, and take the profits, that amounts to her agreement to the estate made to her during coverture. 3 Co. 26. a.

If the wife, after the death of her husband, take a second husband, who accepts rent reserved upon a lease by his wife with her first husband, that affirms the lease against the wife for the whole term; for her assent is devolved to the second husband. Per three J. Dy. 159. a. 1 Rol. 475. l. 12. (d)

(b) As to confirming her deed, see Cowp. 201.

(c) Acceptance of rent by the wife surviving, confirms a voidable lease of her land made by husband and self. 7 T. R. 478.

(d) A., by bond previous to marriage with B., agrees to settle B.'s estate to the use of her and the children of the marriage, and then to A.'s right heirs, but B. is not an executing party; during the marriage, real estate descends to B.; A. makes his will, reciting the bond, and devises this estate back to B., and gives her all his estate, real and personal, and makes her executrix; she proves the will, and possesses herself of all his estate; by so doing, she agrees to the settlement in the bond mentioned, and after her death it shall go to the children of that marriage. 2 Ves. 523.

(S 4.) What shall be a waiver.

If the wife, after the death of her husband, bring a writ of dower, it shall be a waiver of the estate, limited to her after marriage for her jointure. 3 Co. 27. a.

Though she brings dower only for a third part of the residue, and not of all the lands of the husband. 4 Co. 5 b.

Though she had secretly entered before dower brought; for after a recovery in dower she shall be estopped to say, that she had an estate assigned for a jointure. R. 4 Co. 5.

So, since the st. 27 H. 8. 10. the wife may waive her jointure, made after marriage, by parol in pais, and accept her dower by assignment in pais. 3 Co. 27. a.

So at the common law, an use might have been waived by parol: 3 Co. 27. a.

(S 5.) What not.

But, by the common law, an estate of freehold could not be waived by bare parol in pais. R. 3 Co. 26. a.

Nor, generally, an estate since the st. 27 H. 8. 10. where the possession is executed to the use. R. 3 Co. 27. a.

(S 6.) The effect of her waiver.

If husband and wife make a lease, and after the death of her husband the wife enters, it cannot now be pleaded, that the husband and wife *dimiserunt*. 1 Leo. 192. Vide ante, (G 3.)

(T) What estate the wife cannot waive.

But, if the estate of a feme covert be discontinued, and a feoffment; &c. is made to her only, whereby she will be remitted, she cannot waive the feoffment after the death of her husband. Co. L. 357. a.

So, if the discontinuance of the husband grant the estate to the husband for life, remainder to the wife; the wife cannot waive the remainder after the death of her husband, for she was immediately remitted. Co. L. 358. b.

So, if there be a feoffment to the husband and wife in tail, remainder to A. The husband discontinues, and takes back an estate to him and his wife in tail, remainder to B.; though the wife, in respect of herself, may take which she pleases, both the estates being after marriage, yet she ought to take the first, which was for the benefit of A. in the remainder. Hob. 255. 71.

Yet, when both estates are waivable by a wife, without prejudice to a third person, she may waive which she pleases, though one would make her a more beneficial estate than the other: as, if there be a feoffment to husband and wife and their heirs, the husband discontinues, and takes back an estate to him and his wife, and the heirs of their two bodies; she may waive which estate she pleases. Co. L. 357. a.

So;

So if there be a gift to husband and wife, and the heirs of their bodies, the husband alone levies a fine, and devises to the wife for life; she may waive the estate tail, or the devise; for all others, who have interest, are barred by the fine. Dy. 351. b. in marg.

(V) In what actions husband and wife ought to join.(c)

In all actions real for the lands of the wife, the husband and wife ought to join. R. 1 Bul. 21.

So

(e) It is proposed to exhibit in this note a concise view of the doctrine distributed under the principal and two following divisions: — 1. *When the husband must be joined.* — A married woman cannot sue without her husband, not even in the character of agent or executrix; having no civil existence or power of acting in civil matters distinct from his. — 2. Even in the city courts the husband must be joined. — 3. But she may sue as a single woman where the coverture is suspended. — 4. *When the wife must be joined.* In suits for causes accrued to the wife in her own right whilst single, she must invariably be joined. Moor, 422. Cro. Eliz. 537. 3 T. R. 627. — 5. In a suit for a cause of action accrued to the wife alone, and in her own right, during coverture, she must be joined. — 6. Hence in a suit on a covenant to pay the price of her freehold estate sold during coverture. — 7. On a covenant for title or further assurance annexed to her freehold. — 8. For beating her person. Cro. Jac. 501. — 9. Slandering her reputation. — 10. Injuring her personal property not reduced to possession, in fact or in law, by the husband. — 11. Disturbing a private office or employment filled by the wife alone, as the employment of a dipper at Tunbridge Wells. 2 Wils. 423. — 12. In a real or mixed action for the wife's freehold property. — 13. Or the evidences of her title to such property. 1 Rol. Abr. 547. — 14. She must also perhaps be joined in an action of debt for subtracting the tithes of her rectory. Cro. Eliz. 613. Vide Jenk. 275. W. Jones, 325. — 15. And for the breach of a covenant for title or farther assurance annexed to an estate granted to the husband and herself. Cro. Car. 505. — 16. Where too a cause of action shared by the husband and wife, has arisen during coverture, if the right it confers will, when reduced to possession, belong jointly to the husband and wife, she must join in the suit for it. — 17. It is said that where goods belonging to the wife have been found by a third person before the marriage, and converted by him since, the husband may either sue alone or join his wife as co-plaintiff. 1 Vent. 260. 2 Lev. 107. — 18. The latter course seems the most correct, since the husband had no share in the property when converted. — 19. The same reason holds to require that the wife be joined in replevin for her goods taken whilst sole, though here too, it is said, the husband may sue alone. B. N. P. 53. — 20. The same that the wife be joined under like circumstances in detinue; but it is said by some that here the husband must sue by himself. B. N. P. 50.; by others that the wife may be joined. 1 Vent. 261. — 21. For causes in *alieno jure* accrued before coverture, the wife must be joined. — 22. And for those accrued during coverture likewise; even perhaps where personality belonging to the estate she represents has been injured or taken away, since she is *primâ facie* chargeable for it to creditors. — 23. If a debtor to the estate has paid the debt to a third person to pay over to the wife, she must be joined in suing the receiver to recover it; but had it been paid under the husband's authority, he must have sued alone. 1 Salk. 282. — 24. If such debtor promises to pay, the husband forbearing to sue him, the husband must sue alone when the time of forbearance has elapsed. Carth. 462. — 25. *When the wife may be joined, or the husband sue alone.* Where a cause of action shared by the husband and wife has arisen during coverture, if the right it confers will, when reduced to possession, belong wholly to the husband, he may either sue for it by himself, or jointly with his wife. — 26. Hence the husband may sue by himself or jointly with his wife for the breach, during coverture, of simple agreements made with the wife whilst single. — 27. For the breach of one given to her during coverture, and in which she is legally interested. — 28. For the breach of deeds made with her before marriage or since. — 29. On a judgment recovered by both. — 30. For arrears of rent. 6 Edw. 4. Hil. 3. p. 10. 7 Edw. 4. Easter, 16. p. 5. 1 Bulst. 21. 2 Bulst. 253. Savile 111. — 31. Or breach of covenants annexed to a reversion granted to both, or to a lease by both of the wife's land. Cro. Jac. 599. — 32. For trespassing upon the wife's land, felling her trees. 47 Edw. 3. M. 5. p. 9. — 33. Or ousting herself and husband from a term

So in a right of ward. Ow. 83.

So in actions personal, for a chose in action, due to the wife before coverture, they ought to join: as, in debt upon a bond, or specialty made to the wife before coverture. 1 Rol. 347. l. 53. D. Ow. 82. Cro. El. 537.

So debt for rent, upon a lease for years, due before the coverture. Cro. El. 700.

Or upon a lease for life. 1 Rol. 348. l. 8.

So in an avowry for rent upon a lease for life or years, before coverture. 1 Rol. 348. l. 8. 347. l. 50.

So in debt for rent upon a lease at will by the wife, before coverture. Co. L. 55. b.

So in trover, upon a conversion of the goods of the wife before coverture.

In assumpsit, upon a promise to the wife, before coverture. 1 Sid. 25.

Or for the labour of the wife *dum sola*.

In an action upon the case, for stopping a way to the wife's close, before marriage. R. Cro. Car. 419.

So in debt for arrearages upon an account, found before auditors assigned by the husband and wife to the receiver of the wife. 1 Rol. 348. l. 5.

So they ought to join in actions, which arise during the coverture, if the wife might have an action for the same cause, if she survive.

As in detinue of charters of the wife's inheritance. 1 Rol. 347. l. 49.

In trover, for a deed of rent-charge granted to the wife *dum sola*, though it was lost after the coverture.

In an action upon the st. 8 H. 6. for a forcible entry, or detainer. Mo. 5.

In covenant as assignees of B. upon a covenant to make an assurance to B. his heirs and assigns. R. 1 Rol. 348. l. 25. Jon. 406, 7.

Or upon other covenant as assignees, where the assignment is to both. R. Cro. Car. 505.

granted to them. Plowd. 2. — 34. For rescuing a prisoner or property, taken for a demand owing to the wife alone, or jointly with her husband. — 35. For the escape of a prisoner taken for a demand due to the wife whilst sole. Moor, 422. — 35. For the wasting a tenement held under a lease from the wife whilst single, or the husband since their marriage. — 36. For permitting a fence which separates the wife's property from her neighbour's to decay. — 37. For a nuisance to her landed property. — 38. And in trover, detinue, and replevin under the circumstances stated before. — 39. It has been said, that if husband and wife are maliciously prosecuted, they may join in suing the aggressor. Cro. Car. 553. — 40. But this seems to be a mistake; since the wife does not share in the inconvenience to the husband. Cro. Jac. 355. W. Jones, 440. — 41. The wife must perhaps be joined in debt for substracting tithes due to her. — 42. And in suing for the breach of a covenant for title or further assurance annexed to an estate granted to herself and husband. Supra. — 43. *When the husband must sue alone.* Where a cause of action in which the wife does not share arises during coverture, the husband must sue for it alone. — 44. Hence he must sue by himself for the breach of contracts, in which, though in terms they have been made with the wife as well as the husband, she does not share; as of a promise by her debtor to pay the sum owing at a certain day, in consideration of forbearance by the husband. — 45. So for the loss of her society from beating or maiming her, and of customers by slanderous her reputation. — 46. For impairing or taking away personal chattels belonging to the wife whilst single, after they have been reduced to the husband's possession. — 47. And for waste of her land demised by himself alone.

So

So the husband and wife ought to join in waste, upon a lease for years by the husband and wife, seized in right of his wife. Sav. 111.

So for a personal wrong to the wife, the husband and wife ought to join: as, for a battery of the wife. R. Yel. 89. 1 Brownl. 205. 1 Rol. 360. 2 Cro. 501. 538. Adm. Cro. Car. 90.

Or false imprisonment of the wife. 1 Sal. 119. Semb. Lane, 53, 4.

Though a thing be added by way of aggravation, which goes only to the damage of the husband: as, if it be added, *quod negotia* of the husband, &c. *infecta remanserunt*. R. 1 Sal. 119.

In an action upon the case, for maliciously indicting of his wife. Jon. 440. Vide post, (X.)

So in an action for a thing due to the wife *en auter droit*, they ought to join: as if they sue for a debt, &c. to the wife as executrix, or administratrix.

So if a debt to the wife's testator be paid to A. for the wife, without an express direction of the husband, they ought to join in an action against A. and the husband alone cannot sue for money received to his use. R. 1 Sal. 282.

(W) In what the husband shall sue alone.

But where the wife cannot have an action for the same cause, if she survive her husband, the action shall be by the husband alone.

As in an *indebitatus assumpsit* for the labour, &c. of the wife during the coverture. R. 4 Mod. 156. R. 1 Sal. 114.

In an *indebitatus assumpsit*, upon any promise to the wife after coverture. R. Cont. 2 Cro. 77. 205. 1 Sid. 25. Vide post, (X.)

In an *assumpsit* to the husband, in consideration of forbearance, &c. to pay a debt due to the wife before the coverture. Per two J. Yel. Cont. 2 Cro. 110. Vide infra.

So in an action upon the case for disturbing him in his common, which he has in right of his wife. R. 2 Bul. 14. Vide post, (X.)

In an action upon the case for words spoken of the wife, by which the husband has a special damage. 1 Sal. 206. R. 1 Lev. 140. 1 Sid. 346.

In an action upon the case for a battery of the wife, *per quod consortium amisit*. R. 2 Cro. 501. 502. Jon. 440. 2 Rol. 556. l. 40. R. 2 Rol. 51.

Or for carrying away the wife, *per quod*, &c. R. 2 Cro. 538. R. Cro. Car. 90.

In debt upon a bond made to the wife after the coverture. R. 3 Lev. 403. D. Litt. 13. Vide post, (X.)

In covenant to husband and wife, by indenture between them of the one part, and A. of the other part; and may declare upon a covenant to himself. R. 2 Mod. 217.

So in trespass, for a trespass done upon his wife's land during the coverture. 1 Rol. 347. l. 40. R. 1 Bul. 21. Jon. 376.

In trespass for taking charters of his wife's inheritance. 1 Rol. 347. l. 32.

In forging of false deeds of his wife's inheritance. 1 Rol. 347. l. 34.

In a ravishment of a ward. Ow. 82. 83.

In an action upon the st. 5 R. 2. for entry into the wife's land. 1 Rol. 347. l. 27. Vide post, (X.)

In trover, &c. for tithes severed from the nine parts, which belong to the wife's rectory. Jon. 325.

So in a *quare impedit*, upon an avoidance during the coverture. 1 Rol. 347. l. 30. Per Dyer Ow. 82. Co. L. 351. a. Per two J. Lit. 13. Dub. Lit. 374. Acc. 1 Brownl. 159. 2 Bul 14.

Or in a *darrein presentment*. Cont. 1 Brownl. 159.

So in debt for rent, upon a lease by the husband and wife after the term expires. R. 2 Bul. 234. R. 1 Bul. 21.

So, in debt for rent incurred during the coverture, upon a demise by the husband of land, which he has in right of his wife, though the term continues. Vide post, (X.)

So, if the demise was by the husband and wife. Semb. 2 Bul. 234. Per Yel. acc. Fleming cont. 1 Bul. 21. Acc. Litt. 13.

So, if the reversion after a lease made, was granted to husband and wife. R. 2 Bul. 234.

So an *assumpsit* lies by the husband alone, upon a promise to him, in consideration of forbearance, to pay a debt due to his wife as executrix. R. 1 Sal. 117. Carth. 462. Vide supra.

In an action upon the case for maliciously indicting husband and wife; for the wife ought not to join for indicting her husband. Jon. 440.

(X) In what the husband may sue alone, or join with his wife.

Yet in actions for a profit incurred during the coverture, to the husband in right of his wife, the husband may sue alone, or join with his wife; as, in a *valore maritagii* accrued during the coverture. R. Ow. 82, 83, that it lies by the husband alone.

But it is more sure by the husband and wife. Ow. 83.

So an avowry for rent of land, which the husband has in right of his wife, incurred during the coverture, ought to be by the husband and wife. 1 Rol. 318. l. 30. 347. l. 51. Vide Win. Ent. 952.

Or it may be by the husband alone. Semb. 1 Rol. 318. l. 35. R. 2 Cro. 442. Per Twisd. 1 Mod. 273. Clift. Ent. 643, 4. Vide 2 Bro. Ent. 244.

So covenant against a lessee for years, for not repairing during the coverture, where the reversion is granted to husband and wife, may be by the husband alone. R. 2 Cro. 399. 3 Bul. 164. 1 Rol. 360.

Or by the husband and wife. 2 Cro. 399. 3 Bul. 164.

So an action upon the case against a lessee for years, for burning his house, where the husband has it for the life of his wife, may be by the husband alone. Dub. Cro. El. 461, 2.

Or by the husband and wife.

So an action upon the case for cutting down trees, the lops of which were reserved to the wife for her life, may be by the husband alone. Semb. Cro. Car. 438. Vide infra.

Or by the husband and wife. R. Cro. Car. 438.

So in debt upon the st. 2 Ed. 6. 13. for not setting out tithes upon the land, which the husband has in right of his wife, they may join. R. Cro. El. 608. 613. R. 1 Jon. 325. R. Mo. 912.

Or the husband alone may sue. Jenk.

So in action for a tort which prejudices a remedy by husband and wife, the husband may sue alone, or they may join; as, in *rescous* for a distress of a rent-charge due before the coverture, the husband alone may sue; for it is a wrong to him. R. Cro. El. 459. Mo. 422.

Or they may join. R. Cro. El. 459. Mo. 422.

So in an action for champerty or maintenance in a suit against the husband and wife, the husband alone shall sue. 2 Inst. 563.

Or they may join. 2 Inst. 563.

So, in a *decies tantum* for embracery in an assise against husband and wife. 1 Rol. 447. l. 42.

So there may be a *scire facias* by the husband alone, upon a judgment for damages by the husband and wife. 3 Lev. 403.

So, if the cause of action be only commenced before coverture, and completed afterwards, the husband alone may sue, or the husband and wife may join; as, in trover, where the goods were lost before marriage, and the conversion was after, they may join. 1 Sid. 172. 1 Vent. 261. 2 Lev. 107.

Or the husband may sue alone. Per Hale, 1 Vent. 261. 2 Lev. 107. Per two J. 1 Sid. 172.

So, if a woman lease for years, rendering rent, and afterwards marry, the husband and wife may sue for rent due after the coverture; or the husband alone shall have debt for it. Pal. 207.

So where the wife is the meritorious cause of action, the husband alone may sue, or the husband and wife may join, though damages only are recovered; as, in assumpsit to the wife after coverture for a cure, the husband and wife may join. R. 2 Cro. 77. 205. 1 Sid. 25. R. 1 Sal. 114. Per Dodr. 2 Rol. 250.

Or the husband alone may sue. Semb. 2 Cro. 77. 205. Per Glin, 2 Sid. 128. Vide ante, (W.)

So upon a promise to pay 8*l.* *per annum* to the husband and wife during coverture, they may join.

Or the husband alone may sue.

So upon a bond to the husband and wife after coverture, or to a feme covert by herself, they may join. Lit. 13. Semb. 1 Ver. 396.

Or the husband alone may sue. 2 Mod. 217. 1 Ver. 396. Lit. 13. Vide ante, (W.)

So, if there be an award to pay so much to the husband, and so much to his wife, they may join for the money awarded to the wife.

Or the husband alone may sue. Lit. 13.

So in an action for a tort during the coverture, if it may be to the damage of the wife, if she survive, as well as of the husband, they may join, or the husband shall sue alone; as, in trespass for cutting down trees upon the land of the wife, the husband and wife may join. Vide supra. Vide 1 Rol. 348. l. 18.

Or the husband alone may sue. Adm. 2 Vent. 195.

In an action upon the st. 5 R. 2. for entry into the wife's land, they may join. 1 Rol. 348. l. 20.

Or the husband alone may sue. 1 Rol. 347. l. 28. Vide ante, (W.)

So in an action upon the case for stopping a way to the land of the wife, they may join. R. Cro. Car. 419.

Or for inclosing land in which the wife has a common.

Or for not grinding at his wife's mill.

Or in these cases of stopping the way, inclosing the common, or not grinding at the mill, the husband alone may sue. Vide ante, (W.)

So, in a *clausum fregit* upon the wife's land, they may join. Dub. 2 Vent. 195.

Or the husband may sue alone. 2 Vent. 195.

So for a wrong founded upon one entire record against both, they may join, or the husband alone shall sue; as, in an action upon the case in nature of a conspiracy, for maliciously indicting husband and wife, they may join. Per Croke, Cro. Car. 553. Jon. 440.

Or the husband alone shall have it. Semb. Cro. Car. 553.

So for a malicious presentment in the spiritual court. Semb. 2 Cro. 355.

(Y) What actions shall be against husband and wife. (f)

Actions real, for the land of the wife, ought to be against the husband and wife.

So debt for rent upon a lease for life, or years, made to husband and wife, shall be against both. 1 Rol. 348. l. 45. 50.

So an action for a tort, done by the wife after marriage, shall be against husband and wife: as trover, upon a conversion by the act of the feme covert only. 1 Rol. 6. l. 10. R. 1 Leo. 312.

An action upon the case against husband and wife lies for retaining his servant; for the reception of another's servant into their custody, is a tort. Semb. 2 Lev. 63.

So an action, which charges the husband for an act of his wife, done before coverture, shall be against both: as, trover, upon a conversion by the wife before marriage. Co. L. 351. b.

Or, *detinuc* for goods taken by the wife before the coverture. Co. L. 351. b.

(j) 1. *When the husband must be joined.*—A married woman cannot be sued without her husband, even in the character of agent or executrix; and even when sued as a sole trader in the courts of the city of London.—2. Unless the coverture is suspended.—3. *When the wife must be joined.*—In suing for causes imposed upon the wife in her own right, whilst single, she must invariably be joined.—4. In suits or liabilities incurred during coverture by the wife alone, and in her own right, she must be joined.—5. Hence she must be sued jointly with her husband on her covenant in a fine levied of her land.—6. And for beating or slandering another.—7. In suing on liabilities incurred by the husband and wife, she must be joined, or the husband may be sued alone, according as the joinder of a common person in her situation would be required or might be dispensed with.—8. Hence she may be sued with her husband for a joint battery by both, or he may be sued alone.—9. She must perhaps be sued with him on a covenant in a lease made by or to them jointly, or to or by herself whilst single.—10. And the same may be said in suing for arrears of rent reserved thereon.—11. Or for wasting the tenement.—12. So they must be sued together on a judgment recovered against them.—13. For causes in *alieno jure* the wife must be joined as a co-defendant in a suit for these, since she alone represents the estate from which they are due.—14. *When the wife may be joined, or the husband be sued alone.*—Vide *supra*, and note that she may be sued for harbouring the servant of another. 2 Lev. 63.—15. When the husband must be sued alone.—If the wife has joined with her husband in a simple contract or deed not annexed to real property, he alone must be sued for non-performance.—16. He alone too can be sued as pernor of the profits for the arrears of a rent-charge or *seck*, imposed upon the wife's land.

So,

What actions the husband shall have by his surviving. 253

So, debt for rent, upon a lease at will to the wife *dum sola*. Co. L. 55. b.

Or, upon a lease for years, where the rent incurred before coverture. Mod. Int. 162. 175.

But an action for a tort, done by the husband and wife jointly, shall be against the husband alone; for the whole shall be intended to be the act of the husband: as, trover of goods, and conversion to their use. R. 1 Rol. 348. l. 37. R. Pal. 343. Vide in Pleader, (2 A 2.)

So an action upon an assumpsit by husband and wife, against both, is bad; for *quoad* the wife, the promise is void. Pal. 313.

Though it be for vestments bought by the wife. R. 4 Leo. 42.

So debt lies against the husband alone, for rent incurred during the coverture, upon a lease to the wife *dum sola*. Tho. Ent. 117.

Or, upon a lease which the wife has as executrix, or administratrix. Tho. Ent. 117.

If an action be brought by or against husband and wife, where it ought to be by or against the husband alone, it will be error; or it may be moved in arrest of judgment.

So, if it be by husband and wife, for a matter in which they ought to join, and also for a matter for which the husband ought to sue alone. Vide Action, (G.)

So, if it be against husband and wife, for a battery by both, and the husband is found not guilty, the action fails; for the husband ought to be joined only for conformity. R. Yel. 106. R. Cont. 1 Vent. 93. R. acc. 1 Brownl. 209.

But, if there be an action by husband and wife, for a battery of both, (which would be bad, for the wife cannot join for the battery of her husband,) and as to the husband, the defendant is found not guilty, it will be good. Per Bridg. Hard. 166. R. 2 Vent. 29. 2 Cro. 665. Vide Action, (G.)

So, if the damages are found several for the battery of the husband, and for the battery of the wife, and the husband release the damages for his own battery. R. 1 Vent. 328.

So, if there be an action by husband and wife for a battery of the wife, and taking the vestments or goods of the husband with her, and the defendant is found not guilty of taking the goods. Cont. 1 Lev. 3. Vide Action, (G.)

(Z) What actions the husband shall have by his surviving.

If a feme covert die, and the husband survive, he shall have an action for any thing incurred during the coverture; as, the husband shall have debt after his wife's death, for rent incurred to the wife during coverture. 1 Rol. 352. l. 5.

So, if the wife had a manor, the husband, after her death, shall have debt for a relief, which fell during the coverture. 1 Rol. 352. l. 11.

So he shall a ravishment, or an ejectment of a ward, of which he was ousted in the life of his wife. 1 Rol. 352. l. 8.

So, if the wife has judgment *dum sola*, and thereupon the husband and wife sue out a *scire facias* and have judgment but before execution

cution the wife dies, the husband, who survives, shall have a *scire facias* upon it. R. 1 Sal. 116. Skin. 682.

So the husband alone may have debt upon it. 3 Mod. 189.

So, by the st. 32 H. 8. if the wife has a rent-charge for life, which is in arrear before, and after the coverture, the husband surviving shall have debt for all the arrears. R. 1 And. 47.

But, if husband and wife recover a judgment in debt, in right of the wife, as executrix to A. and the wife dies; the husband shall not have execution upon this judgment, though he be privy; for the debt belongs to the succeeding executor or administrator of A. R. 1 Rol. 889. l. 10.

(2 A.) What the wife, if she survives.

So, if husband and wife recover in a real action, in right of the wife, and the husband dies, the wife shall have execution, and not the executor of the husband.

So, if they recover in a *quare impedit*, and the husband dies, the wife shall have the writ to the bishop, and execution for the damages. 1 Rol. 889. l. 50.

So, in an assise, or other real action, if the husband and wife recover, and the husband dies; the wife shall have execution for the damages, as well as for the land. 1 Rol. 889. l. ult. 890. l. 3.

So, after a judgment by husband and wife, if the husband dies, the wife shall have an attain. 1 Rol. 889. l. 45.

And if she recovers, she shall have execution, though the damages were paid by the husband. 1 Rol. 889. l. 45.

So the wife surviving, shall have trespass, for a trespass upon her land during the coverture. R. Pal. 313.

Or, for a trespass, part in the life of the husband, part afterwards. R. Pal. 313.

(2 B.) What actions shall be against the husband, if he survives.

If a woman, lessee for life, takes husband, and dies, the husband shall be charged for rent incurred during the coverture; for he takes the profits of the land, out of which the rent issues. 1 Rol. 351. l. 35.

So, for rent incurred during the coverture, upon a lease for years. R. Ray. 6. 1 Lev. 25.

So, if the husband, after the death of his wife, undertakes to pay for goods sold to her as a feme sole trader, he shall be charged; for he is entitled to administration to her. R. Cont. Sho. 184

So, if the husband and wife, upon payment of a sum in gross, undertake to discharge an annuity to the wife, and the wife die, an *assumpsit* lies upon this promise against the husband surviving. R. Pal. 312, 313.

If there be judgment against husband and wife upon a bond of the wife, who dies before execution; the husband shall be charged. Agr. 1 Sid. 337. Lut. 671.

So,

So, if there be judgment against an husband and wife executrix, or administratrix, upon a *devastavit* during the coverture, and the wife dies, the husband shall be charged. Cro. Car. 519. R. 1 Sid. 337.

If there be judgment against the wife *dum sola*, and a *scire facias* upon it against husband and wife, and judgment, but before execution the wife dies, yet a *scire facias* afterwards lies against the husband who survives. R. 3 Mod. 186. 1 Sal. 116. Lut. 671. Carth. 30.

(2 C.) What not.

But the husband shall not be charged after the death of his wife, for a debt due from the wife before coverture (*g*); for it was only in action. 1 Rol. 351. l. 40. (*h*)

So, though there was judgment against a woman *dum sola*, who afterwards takes husband, and dies, the husband shall not be charged upon this judgment. Agr. 3 Mod. 186.

So, if there be judgment against an husband and wife, as executrix, *ut de bonis testatoris*, and upon a *feri facias* thereupon, the sheriff returns a *devastavit*, and the wife dies before judgment against them *de bonis propriis*, the husband shall not be charged. Dub. 1 Rol. 351. l. ult. Semb. 3 Mod. 189.

So, if a feme executrix, or administratrix, takes husband, and they commit a *devastavit*, but the wife dies before judgment against them, the husband shall not be charged. Cro. Car. 519. 2 Ver. 118. Vide Chancery, (2 M 8.)

So, if the husband of a lessee for life does waste, and the wife dies before a recovery against them, the husband shall not be charged. 1 Rol. 351. l. 41. D. Lut. 674.

So, if there be judgment against husband and wife as executrix, and the wife dies, debt does not lie against the husband upon a suggestion, that he converted the goods of the testator to his own proper use. R. Lut. 674.

So, if there be a decree in equity against an husband and wife executrix, to be paid out of the assets of the testator, and the wife dies, there shall be no execution against the husband, without reviving against the administrator *de bonis non*, &c. 2 Ver. 195.

(2 D.) Pleading by husband and wife.

How husband and wife ought to plead in an action by, or against them. Vide in Pleader. (2 A 1, &c.)

If husband and wife are seized, they ought to plead, that they are both seised *in jure uxoris*, and not, that the husband is seised. (*i*) Vide Pleader, (2 A. 1.)

(*g*) But the wife, if she survive, may. 1 Camp. 189.

(*h*) 1. Nor where a woman indebted *dum sola* marries, and brings a portion to her husband, and dies, will equity help the creditor against the husband to the value of what he received with her. 5 P. Wms. 409. C. T. T. 173. 2 Eq. Ca. Abr. 134. pl. 5. — 2. Though her outstanding choses in action will be assets. 5 P. Wms. 411. — 3. Unless they were expressly secured to the husband by settlement made on adequate consideration. 9 Ves. 87.

(*i*) In covenant by the husband of tenant in fee, he must declare on a seisin in their demeasne as of fee in himself and his wife, in right of his wife Dougl 329

When coverture shall be pleaded in abatement. Vide ABATEMENT, (E 6. 11. — F 2. 7.)

As to suits, and other matters in equity. Vide CHANCERY, (2 M 1, &c. — 3 Z 1, &c.)

Appearance in actions against husband and wife. Vide PLEADER, (B 4).

Receipt of the wife, in default of the husband. Vide RECEIPT, (A 3. — B 1.)
Vide also BANKRUPT, (D 7. 11.)

BARRETRY.

(A) Barretor ; who shall be. p. 256.

(B) Who not. p. 256.

(C) Indictment for Barretry. p. 256.

(A) Barretor ; who shall be.

A common barretor is a common quarreller in his own cause. R. 8 Co. 36. b.

So, a common exciter or maintainer of quarrels, or suits in courts. Co. L. 368. a.

Whether they are courts of record or not of record. Co. L. 368. a.

Or in the country ; as if he move, or maintain affrays, &c. in his own cause, or between others. Co. L. 368. a. R. 8 Co. 36. b.

If by force or craft he gain the possession of the lands or goods in controversy. R. 8 Co. 36. b. Co. L. 368. a.

If he maliciously purchase a *supplicavit* for the peace, to enforce a composition. 8 Co. 37. b.

If he invent or disperse false rumours, whereby discord arises. R. 8 Co. 36. b. Co. L. 368. b.

If a man commit common barretry, he shall not be excused, because he is a common solicitor. R. 1 Rol. 355. l. 25.

Or that he is a counsellor at law. 3 Mod. 98.

(B) Who not.

But it will not be barretry, if a man prosecutes an infinite number of his own suits against others ; for, if he has no cause of action, he shall pay costs. R. 1 Rol. 355. l. 20.

So it is not barretry, if a man solicit suits without cause, if he did not know, that there was no cause of action. Per C. J. 3 Mod. 97.

If he spends money in the lawful suits of another. 3 Mod. 98.

(C) Indictment for barretry.

By the st. 34 Ed. 3. 1. and 2 R. 2. 7. justices of peace have authority to restrain barretors. Vide Justices of Peace, (B 29:)

And

And that, without any special commission of oyer and terminer. R. 2 Cro. 32. Yel. 46.

And therefore an indictment for barrettry will be good, *coram justiciarios ad pacem*, without saying, *necnon diversas felonias audiend'*, &c. R. 2 Cro. 32. Yel. 46. R. cont. 2 Rol. 151.

So an indictment *contra formam statuti*, though the statute of 34 Ed. 3. does not make the offence, but directs the punishment. R. Cro. El. 148. R. Cro. Car. 340.

The indictment shall say, *communis barrectator*. 1 Sid. 282.

For *communis vicinorum oppressor* is not good. R. 1 Sid. 282. R. 1 Lev. 299.

Nor *communis deceptor*. R. Mod. Ca. 311.

So it must shew the place where he was a barretor. R. Lat. 194. R. Pal. 450.

But the indictment need not shew in what instances (g) he is a barretor. R. 2 Cro. 527.

Vide Maintenance.

BASTARD.

(A) Who shall be. p. 257.

(B) Who not. p. 259.

(C) The writ de ventre inspiciendo. p. 260.

(D) Bastardy.

(D 1.) When it shall be pleaded. p. 260.

(D 2.) How tried. p. 260.

(E) When a bastard shall take an estate, and when not. p. 262.

(F) When the possession of the bastard eigne binds the mulier. p. 263.

(G) When a bastard shall be maintained.

(G 1.) By the parish. p. 264.

(G 2.) By order of justices of peace. p. 265.

(G 3.) What shall be a good order. p. 266.

(A) Who shall be.

A bastard is every one born out of lawful matrimony. Co. L. 244. a. Though matrimony be afterwards solemnized between the parties;

(g) Though a general indictment for barrettry is good, yet the prosecutor must give the defendant notice, before trial, of the particular instances meant to be proved; so that the inconvenience of a general charge is obviated. 1 T. R. 754.

for in such case he is a bastard by the common law, though he be a mulier by the civil law. 1 Rol. 357. l. 47. 50. 359. l. 30. 37.

So, if a man marry a second wife, the first being alive, the issue between them will be bastards; because the second marriage is void. 1 Rol. 357. l. 40.

So, if a man marry, and be afterwards divorced *à vinculo*, the issue between them born before or after the divorce, will be bastards. 1 Rol. 359. l. 35. 360. G. Vide Baron and Feme, (C 1, &c.)

So, if a man marry, who has an apparent impossibility of procreation, and his wife have a child, it will be a bastard; as, if the husband was an eunuch. 1 Rol. 358. l. 5.

If the husband was but seven or eight years old. Co. L. 244. a. 1 Rol. 359. l. 1 to 10.

If the husband was not (*h*) within the four seas for such time (*i*) as that it may be his issue. 1 Rol. 358. l. 40 to 50. Sal. 122. R. Sal. 484. 5 Mod. 420.

So, if the husband and wife are divorced *a mensa & thoro*, and the wife, during the separation, has a child, it will be a bastard, unless mutual access (*k*) be proved (*l*); for obedience to the sentence shall be intended. R. 1 Sal. 123.

So, if there be a separation by consent, and the jury find, that there was no access between the husband and wife, the issue born will be a bastard, though *prima facie* access shall be intended, 'till the contrary be found by verdict. 1 Sal. 123.

So, if a child be born so long after the death of the husband, that it cannot be his issue, it will be a bastard. 1 Rol. 356. l. 10. 40. Vide post, (B.)

(*h* Vide infra. (B.)

(*i*) If the husband be proved beyond seas until within a fortnight of his wife's delivery, the child is a bastard; absence during the entire period of pregnancy being immaterial, where the circumstances of the case demonstrate a natural impossibility that the husband can be the father. 8 East, 193. 12 East, 550.

(*k*) 1. The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access. 4 T.R. 356. — 2. And even where access must be presumed, yet legitimacy is not therefore necessary to be inferred, since evidence may be given of the husband's inability to beget children. Stra. 940. — 3. Where however it is found that the husband had no access, there is no presumption of legitimacy. Str. 51. — 4. So proof of non-access until such a time before the birth as that in the ordinary course of nature the father could not have begot the child, is sufficient. 8 East, 193. — 5. And evidence that the husband abandoned his wife, that she went to live with another man, whose name she took, as did the child likewise, was held presumptive proof of non-access, though it was not shewn where the husband was all the time. 4 T.R. 356.

(*l*) 1. The sole evidence of the mother, a married woman, shall not be received to bastardize her child. B. R. H. 79. 1 Wils. 340. — 2. But she may prove the criminal communication; and if the want of access is proved by other witnesses, that will be sufficient. Ibid.

(B) Who not.

But, generally, a child born within matrimony (*m*), is not a bastard, if the husband was within the four seas. Co. L. 244. a. (*n*)

Though it was born within a week, or a day after marriage. Co. L. 244. a. 1 Rol. 358. l. 10. 359. l. 45.

Though the wife was big with child by A. and marries B. and then the child is born. 1 Rol. 358. l. 20.

Though the wife elope, and cohabit with a stranger in adultery, if her husband be within the four seas. 1 Rol. 358. l. 25. 30. 359. l. 52.

Though the wife cohabit in another country, and there take a second husband, and have a child by him, it is not a bastard, but it shall be the child of the first husband by intendment of law. 1 Rol. 358. l. 35.

Though the wife was precontracted, or within the degrees of consanguinity or affinity, if she be not afterwards divorced. 1 Rol. 357. l. 42. 45.

And after the death of the parties (*o*), the marriage cannot be drawn in question to bastardise the issue. 1 Rol. 360. H. Vide Baron and Feme, (C 6.)

So, if a man have a child by a second wife, though he was divorced from his first for impotence, the child shall not be a bastard; for he may be *habilis & inhabilis diversis temporibus*. Vide Baron and Feme, (C 3.)

Though the divorce was *propter perpetuam impotentiam*. R. Mo. 227. unless the divorce be annulled by sentence in the life of the parties. 1 And. 185. 2 Leo. 169.

So a posthumous child shall not be a bastard, if he be born within 40 weeks after the death of the husband. Co. L. 123. b. Pal. 9. Godb. 281.

So, if it be born within a few days after the 40 weeks, if it can be proved, by circumstances, to be the issue of the husband; for the law does not appoint any certain time for the birth of a child. R. 1 Rol. 356. l. 10. 2 Cro. 541. Pal. 9. (*p*)

So if the wife marry a second husband, presently after the death of her first, it may be the child of the one, or the other, according to the circumstances of the case. Co. L. 8. 1 Rol. 357. l. 30. Pal. 10.

If born above 40 weeks after the death of the first husband, it shall be the child of the second husband. Pal. 10.

(*m*) During the lives of husband and wife, be they never so old, the law will presume the possibility of issue; and by the same reason, posthumous issue. 2 M. & S. 67.

(*n*) But now the rule is settled, that if it be shewn that there has been no access, the issue are bastards, though the husband was within the four seas. Str. 925. 1076. B. R. H. 379. 13 Ves. 58.

(*o*) 1. General declarations, or the answer of a parent in chancery, are good evidence, after the parent's death, to prove that a child was born before marriage, but not to prove that a child born in wedlock is a bastard. Cowp. 591. — 2. And the examination of a single woman before a magistrate, under 6 Geo. 2. c. 31. will be evidence, after the woman's death, against the reputed father, on his appearance at the session to abide the order of the court, according to his recognizance. 5 T. R. 373.

p) Vide Co. Litt. 125. b. n.

If within seven months after the death of the first husband, it shall be the child of the first husband.

(C) The writ de ventre inspiciendo.

If there be a question, whether a woman be *enseint* at the death of her husband, the true heir, to whom the land descends, may have a writ *de ventre inspiciendo*. Reg. 227. a. Co. L. 8. b.

And to obtain it, he shall make a suggestion in chancery. Mo. 523.

The writ commands the sheriff to impanel a jury of women, to search whether she be *enseint*. Mo. 523. Cro. El. 566. Reg. 227. a.

If the twelve women give a verdict, and return, that the woman is *enseint*, another writ shall go, commanding, that she be safely kept, &c. and duly inspected by the women, who must be present at her delivery. Cro. El. 566.

But an heir apparent shall not have a writ *de ventre inspiciendo*. Co. L. 8. b.

And if the woman marry after the death of her husband, she shall not be taken out of the custody of the second husband, if he gives a recognizance, that he shall not be removed, and that some of the women shall daily inspect her. 2 Cro. 686.

(D) Bastardy.

(D. 1.) When it shall be pleaded.

In a real action, where the demandant makes title as heir; as, in *aiel*, *cosinage*, &c. the tenant may plead, that the demandant is a bastard, generally. Rast. 29. b.

So in a writ of entry. Rast. 279. b.

So he may say, that such a one, through whom the demandant claims, is a bastard. Rast. 105. a.

So where the defendant makes title as heir, the plaintiff may, by his replication, say, that the defendant is a bastard. Rast. 314. b. 315. a.

So the defendant may plead bastardy specially; as, that he was born before espousals, and so a bastard. 2 Rol. 586. l. 20.

Or, that he was born of a second wife, living the first. 2 Rol. 586. l. 8.

So that there was a divorce *à vinculo*, and so he is a bastard. 2 Rol. 586. l. 37.

To bastardy pleaded, the plaintiff may reply, that he is legitimate, and not a bastard. Rast. 29. b.

(D 2.) How tried.

Special bastardy shall be tried by the country. 2 Rol. 584. l. 35. 586. l. 7. 20. 3 Leo. 11.

So general bastardy, where it is not directly in issue. 2 Rol. 584. l. 31. 35. 37. Vide Certificate, (A 2.)

Or if it be alleged in a dead person, or a stranger to the action; for it is not reasonable, that a man, not a party, should be concluded by a peremptory trial. 2 Rol. 584. l. 25. 30. 3 Leo. 11.

So,

So if it be alleged in an infant plaintiff, or defendant. 2 Rol. 584. l. 38. 47. 586. l. 40.

If it be pleaded in abatement. 2 Rol. 588. l. 12.

So in an action for slandering him with the name of bastard, if the defendant justifies, it shall be tried by the country. 2 Rol. 586. l. 25. Hob. 179.

But regularly, general bastardy shall be tried by the certificate of the ordinary. 2 Rol. 586. l. 5. 12. 1 Rol. 361. l. 30. Vide Certificate, (A 1.)

In a personal plea, as well as in a real. 2 Rol. 586. l. 30. 1 Rol. 361. l. 45.

If issue be joined upon bastardy, before a writ to the bishop for trial, proclamation shall be made in the same court. 1 Rol. 361. l. 35. Rast. 29. b. By the stat. 9 H. 6. 11.

And afterwards the issue shall be certified into the chancery, where proclamation shall be made once in every month for three months, whereby all persons may have notice to attend the bishop. By the st. 9 H. 6. 11. Rast 29. b. 1 Rol. 361. l. 35.

And by the same statute, the chancellor shall certify the same court of such proclamations in chancery made, and thereupon a proclamation shall be made *de novo* in the same court. Rast. 29. b. 1 Rol. 361. l. 39.

And then a writ shall be directed to the bishop to certify bastard, or not. 1 Rol. 361. l. 31. Rast. 105. b.

The bishop cannot make a certificate of bastardy, but upon the king's writ to him directed. 1 Rol. 361. l. 31. Vide Certificate, (A 5.)

And upon issue joined, and transmitted to him. 1 Rol. 361. l. 41.

The bishop returns the writ with his certificate. 2 Rol. 592. l. 20. Rast. 105. b.

The certificate ought to be positive. Vide Pleader, (2 Y 10.)

Yet, if he certifies, that he is a bastard, *prout per inquisitionem nobis constat*, it is sufficient. 2 Rol. 591. l. 47. Rast. 105. b.

That he was born in lawful espousals; though he does not say expressly, that he was a *mulier*. 2 Rol. 591. l. 30. 40.

So, if he says, that he was a bastard; though he afterwards adds matter, which shews him to be a *mulier*. R. 2 Rol. 592. l. 35.

The certificate must be under the seal of the ordinary, and not of his commissary. 1 Rol. 361. l. 52.

And if it be in vacation, under the seal of the guardian of the spiritualties. 2 Rol. 592. l. 22.

And the guardian cannot delegate the authority to another. R. 2 Rol. 592. l. 25.

The certificate of the ordinary, in case of bastardy, is final. 1 Rol. 362. M.

And if the ordinary certify a man, who is a party to the issue to be a bastard, and there be judgment given upon it, it shall be peremptory to him for ever. 1 Rol. 362. l. 20.

And he can never have a writ to certify it again.

Though it be in a personal, as well as in a real action. 1 Rol. 362. l. 25.

But a certificate, that he is a *mulier*, is not peremptory; for he may be a bastard by the common law, though he be a mulier by the civil law. 1 Rol. 362. l. 5.

So, if he be certified to be a bastard, it is not peremptory, unless judgment be afterwards given: 1 Rol. 362. l. 33.

Or, if the plaintiff afterwards be nonsuited. 1 Rol. 362. l. 35.

Otherwise, if the writ abates by the death of him who is found bastard. 1 Rol. 362. l. 38.

So, if a stranger be found a bastard by the country, it is not peremptory. 1 Rol. 362. l. 13.

Bastardy may be tried by the country, after the death of the bastard.

So, after the death of the father and mother, though they cohabited as husband and wife in their life-time; for the rule, that none shall be bastardised after his death, extends only to the case of *bastard eigne et mulier puisne*. R. 1 Sal. 120. 3 Lev. 410.

(E) When a bastard shall take an estate, and when not.

A bastard is *nullius filius*. Co. L. 123. a. (g)

And therefore, if land be limited to the use of a man for life, and afterwards to the eldest son (r) of B. A bastard of B., though he be the eldest son, shall not take the remainder. Vide Co. L. 3. b.

So, if it be limited to the eldest issue of B. upon the body of C. begotten. Co. L. 3. b. 2 Rol. 44. l. 5.

Or, to the eldest issue male of B. upon the body of C., be it legitimate or illegitimate. Co. L. 3. b.

Or, to the eldest issue male of B. upon the body of C., legitimate or illegitimate, so that it be reputed the eldest issue of B. upon the body of C., for he cannot have a name by reputation at his birth; and if he does not take it at his birth, he never shall take it; and therefore, a bastard cannot take a remainder, limited before his birth. Co. L. 3. b. Cro. El. 510. cont. in the same case, 2 Rol. 43. l. 45. Mo. 430. (s)

Though B. and C. intermarry after the bastard born, whereby he is a *mulier* by the civil law. Co. L. 3. b.

So, if there be a grant to A. the son of B., and A. is a bastard, it will be void. 2 Rol. 43. l. 40.

So a bastard shall never take by descent. Vide Descent, (C 12.)

So, if a man covenant to stand seized to the use of his bastard son, it will be void, without an express consideration; for the bastard is not his son, but a stranger. R. Dy. 374. b. Co. L. 123. a. 2 Rol. 785. l. 25.

Though it says, in consideration of love to B. his reputed son. R. 2 Rol. 785. l. 30.

So, if the father had conveyed lands in chivalry to his bastard, it was not void for the third part, within the statute 32 H. 8. 1. for a

(g) But this rule holds only with respect to inheritance. In all other respects the relation of parent and child subsists between him and his parents; therefore bastards are within the marriage act, as well because the policy of the act requires that they should be, as upon this account. 1 T. R. 96. Dougl. 548.

(r) The word *children*, legally construed, is confined to legitimate children. 7 Ves. 458.

(s) Vide Co. Litt. 5. b. n.

bastard is not the son or child of any one. R. Dy. 296. b. 313. b. 345. a. Co. L. 123. b. 78. a. (t)

But when (u) a bastard has obtained a name by reputation, he may take, by purchase, an estate granted to him by his name of reputation. Co. L. 3. b. (x)

And therefore, if an estate be granted, or a remainder limited to the son or issue of A., the bastard shall take, when he is reputed by such name. Co. L. 3. b. 2 Rol. 44. l. 5. 10. Adm. 1 Sid. 194.

So, if the mother devise goods to all her children, a bastard child shall take. Mo. 10.

So, if the father do so; for he may take by devise, though not by grant. Q. Mo. 10.

A bastard may purchase to him and his heirs generally, though he can have no heir, but the issue of his body. Co. L. 3 b.

(F) *When the possession of the bastard eigne binds the mulier.*

So, if a *bastard eigne*, who is a *mulier* by the spiritual law, enters after the death of his father, and continues in possession for his whole life, without interruption, and dies seized, and his son enters; by such descent the *mulier puisne* shall be bound for ever. Co. L. 244.

So, if the *mulier* enter upon the bastard, who afterwards recovers against the *mulier* in an assise, and dies seized; for by the recovery the interruption was voided. Co. L. 245. b.

So, if the bastard die seized, and the *mulier puisne* enter before the heir of the bastard; for the descent binds him, not the entry of the heir. Co. L. 244. a.

If the bastard die seized, and his wife is afterwards endowed. Co. L. 244. a.

So, if the *bastard eigne* enter into religion. Co. L. 244. a.

Though the descent was of services, reversion, &c. Co. L. 244. a.

Though the *mulier* was a *feme covert*. Co. L. 244. a.

Though the *mulier puisne* was an infant at the time of the descent. Co. L. 244. a. Dub. Pl. Com. 372. a.

Or die, his wife *privement enseint*, and then the bastard dies seized. Co. L. 244. a.

So, if the *bastard eigne* and *mulier puisne* enter as parceners, and the bastard sister dies seized. Co. L. 244. a.

But if a bastard, who is not a *mulier* by the spiritual law, enter, his dying seized, and a descent, do not bind the *mulier puisne*. Co. L. 244. b.

(t) *Quære*, whether under a provision, if the party should have an illegitimate son generally for such son, one in existence at the time may take. 9 Ves. 557.

(u) 1. But not before. 1 V. & B. 452. — 2. Which is the reason why a natural son cannot take by a prospective bequest made before its birth. 17 Ves. 531. 18 Ves. 289. — 3. And under a bequest to "such child or children, if more than one, as A. may happen to be pregnant with by me," a natural child, of which she was then pregnant, cannot take. 17 Ves. 528. — 4. Though a bequest to the natural child of which a woman was enseint, without reference to any person as the father, would probably be good, having no uncertainty. Ibid.

(x) 1 Ves. & Bea. 466.

So, if the king seizes for a contempt of the father, or upon an office which finds the *mulier* heir. Co. L. 245. b.

So, if the *mulier puisne* enter upon the bastard, though he afterwards re-enter by disseizin, and die seized. Co. L. 245. a.

So, if the guardian of the *mulier*, or any by his command enter. Co. L. 245. a.

So, if the bastard die, his wife *privement enseint*, and the *mulier puisne* enter before the birth of the child. Co. L. 244. a.

So, if the bastard die without issue, and the lord by escheat enters; for there must be a descent. Co. L. 244. a.

So an entry by the *bastard eigne*, a dying seized, and a descent of an estate tail, do not bind the *mulier puisne*. Co. L. 243. b.

(G) When a bastard shall be maintained.

(G 1.) By the parish.

By the st. 18 El. 3. (y) two justices of the peace (one *quorum*) next to the parish church where a bastard is born, shall take order for the punishment of the mother (who, by the st. 7 Jac. 4. if the bastard may be chargeable, &c. shall be sent for a year to the house of correction (z), and for the second offence, till she finds sureties for her good behaviour) and of the reputed father (a), and for relief of the parish in part, or in all, and keeping of the bastard, by charging the mother or reputed father with a weekly payment, &c.

Before this statute (and since (b), where there is no order (c) of jus-

(y) By 49 G. 3. c. 68. s. 1. reputed father to bastards liable to all reasonable expences incident to the birth of such child, and for reasonable costs of apprehending and securing said father, and for costs of order of filiation, not exceeding 10*l*.—Sect. 2. ascertains duty of justice of peace in respect to apprehending, &c. persons sworn against by women likely to be delivered of bastards.—Sect. 3. enforces the maintenance of bastards by reputed parents.—Sect. 4. ascertains expences and costs.—Sect. 5. gives appeal to quarter sessions.—Sect. 6. repeals so much of 6 G. 2. c. 31. as authorizes the justice before whom the reputed father of a bastard child shall be brought, in cases where the woman has not been delivered, to commit him to the common gaol, or house of correction, unless he shall give security to indemnify the parish or place, or shall enter into a recognizance to appear at the next quarter or general sessions.—By s. 7. no appeal relating to bastardy without notice and recognizance.

(z) But both justices must be present at the same time and place, when a woman is examined and committed for not filiating a child. 2 Bl. Rep. 1017.

(a) 1. Semble, that the security to be taken by overseers in case of bastardy, if substantially such as the spirit of 6 G. 2. c. 31. s. 1. vide infra (G 2.) requires, is sufficient. 2 Smith, 246. 6 East, 110.—2. Overseers, however, should proceed to take an indemnity, in cases of bastardy, from the putative father, under 6 Geo. 2. c. 13. s. 1. and cannot commute the same for a specific sum. 2 Smith, 246. 6 East, 110.—3. So, where a bond is extorted under this stat. it must, perhaps, pursue the form prescribed therein; scus, where it is given as a voluntary bond. 1 M. & S. 310.—4. A bond to provide for a child until it should be deemed capable of providing for itself, is sufficiently certain. 1 M. & S. 310.—5. The 54 G. 3. c. 170. s. 8. vests the legal interest in bastardy bonds in the overseers of the poor for the time being.—6. The court will stay proceedings in an action on a bastardy bond, on payment of the penalty and costs. 4 Taunt. 439.

(b) By stat. 13 Geo. 3. c. 82. bastard born in lying-in hospital shall be maintained by the mother's parish, which shall pay for removing mother and child thither, if within 20 miles.

(c) Parish officers are bound to provide for an illegitimate child without an order of justices. 1 H. B. 255.

tices) the parish in which the bastard was born (*d*) without fraud (*e*) must maintain it till it gains a subsequent settlement. Per Jones, 2 Bul. 349. Per two J. of assise, 2 Bul. 350. Acc. Mod. Ca. 213.

But, if the inhabitants of B. remove a woman with child to the confines of T. where she has a bastard, T. shall not maintain it, but B.; for it was a fraud in the inhabitants of B. Per Jones, 2 Bul. 349.

If a woman with child be sent by the parish of B. to an house of correction in T. and she is there delivered of a bastard, T. shall not maintain it, but B.

So, if she be sent by order of two justices to T. as her last settlement, where she has a bastard, but the order, upon appeal to the quarter sessions, is reversed. R. 1 Sal. 121. 532.

(G 2.) By order of justices of peace.

By the st. 18 El. 3. an order for maintenance of a bastard (*f*), must be by two justices next to the parish church where it is born, (*quorum unus*), &c.

By the st. 3 Car. 4. justices of peace, in the sessions, may do all that two justices could do by the st. 18 El. 3.

And therefore now, the quarter sessions may make an original order, as well as upon an appeal from an order of two justices; and in both cases the order of sessions is final. R. Cro. Car. 341. 350. 2 Bul. 355. Pridgeon. 2 Bul. 343. Cro. Car. 470. Jon. 330. (*g*)

And it cannot be varied by the justices of assise, or other two justices of the peace, nor by B. R., unless where the order is not conformable to the statute. R. Cro. Car. 471. Per Jones, 2 Bul. 355. 1 Vent. 310.

By the st. 6 Geo. 2. 31. if a single woman be delivered, or declare herself with child of a bastard, likely to be chargeable to a parish, or any extra-parochial place; and on oath, in writing, before one or more justices of the county, or corporation, charge any one of getting her with child, the justices, on application of any overseer (*h*), may grant a warrant against the person charged, and shall commit him to gaol, or the house of correction, unless he give security to indemnify the parish, or a recognizance to abide the order of the next quarter, or general sessions.

(*d*) 1. The bastard of a certificate person is settled where born. Str. 1168. Bur. Set. Ca. 25. 187. 264. — 2. The mother of a bastard may retain it with her till the age of seven years, though settled in a different parish. Sess. Ca. vol. 289. — 3. But the parish in which it is settled must maintain it notwithstanding. Caldecot, 6. Dougl. 7.

(*e*) If a woman with child of a bastard be removed, and privately return, the settlement of the bastard is where she was sent. Str. 476.

(*f*) 1. The words in the 18 Eliz. c. 3. of "born out of lawful matrimony," apply to the illegitimate child of a married as well as of a single woman. 8 East, 193. 4 M. & S. 559. — 2. But no order of filiation or for payment of the expences can be made, unless the child be born alive. 14 East, 277.

(*g*) 1. B. R. H. 79. 501. Dougl. 632. — 2. But if there be an order of two justices already, the sessions have no jurisdiction, except upon appeal. Str. 503.

(*h*) Where parishes are united under 22 Geo. 3. c. 85. the guardian thereby appointed is substituted in the overseer's place, and one who is *de facto* such, being so received and acknowledged by the parish, though not legally appointed, is competent to apply, in that character, to a magistrate to take the examination of a single woman pregnant with child, in order to filiate the bastard. 15 East, 55.

Provided

Provided, if the woman die (*i*), marry, miscarry, or be not with child, or no order be made within six months after the delivery, &c. he shall be discharged, &c.

But the quarter sessions may vacate an order of two justices upon an appeal, and afterwards make a new order, though not without vacating the former order of two justices. Per Kel. 1 Mod. 20. Sal. 475.

So, after vacating the former order of two justices, or upon an original application to the quarter sessions, the court may refer the examination of the matter to two justices, and after their report, make an order. R. 2 Bul. 343. Per Twisd. 1 Mod. 20. Cont. 1 Vent. 48.

So a person, charged by order of two justices, can never afterwards be charged, if that order be discharged by the quarter sessions. 1 Vent. 48.

The appeal must be at the next general session; for if the order says, at the next general quarter session, it is bad; for perhaps the next quarter session is not the next general session. 1 Sid. 363. R. Sal. 480. 482.

So, at the next general sessions for the same division. Per three J. Kel. cont. 1 Sid. 149.

At the next sessions after notice of the order. 1 Sid. 326.

(G 3.) What shall be a good order.

An order (*k*) for maintenance of a bastard, must be made by two justices, (*quorum* (*l*) *unus*.) 1 Sid. 222. R. Sal. 477.

It must shew (*m*), that the child is a bastard and likely (*n*) to be a charge to the parish. R. 1 Vent. 37. Cont. Sal. 475.

At

(1.) An order in bastardy may be made, notwithstanding the mother's death. 5 T. R. 373. — 2. If the mother die previous to an order of filiation being made, and without having been examined under Geo. 2. c. 51. one may be afterwards made upon the reputed father by means of other evidence; as by the confession of the reputed father. 13 East, 57. — 3. The bastard likewise may, if competent in other respects, be examined upon oath. 13 East, 57.

(*k*) Every intendment will be made to support an order of justices, so that unless it appears, or is shewn to be defective, the facts essential to its validity will be presumed. Hence, if a court of general quarter sessions, next after an order of bastardy, quash the order, it will be intended that no court of general sessions intervened. 5 T. R. 496.

(*l*) There must be *quorum unus*, even by justices in a borough. Str. 974.

(*m*) 1. In an order in bastardy it must appear where the child was born; because, 1st. The jurisdiction is given to the two justices living next to the parish church where born; 2d. To that parish only is the child chargeable; but, if the fact appear in any part of the order, it is sufficient. 6 T. R. 148. — 2. And the order must express that the bastard was born in the parish to which the relief is given. Str. 437. — 3. And it is not sufficient, that it is alleged, in the complaint, where the child was born; there must be an adjudication of it by the justices, or appear by their words. 2 Ld. Raym. 1363. — 4. If, however, the order says, the woman was delivered of a child baptized in the parish of A., it shall be understood to be born there. Str. 1166. — 5. It must express the name and the sex. Str. 503. — 6. But an order in bastardy, not stating it to have been made on complaint of the churchwardens, &c. is good. 6 T. R. 148. — 7. But held a fatal exception to an order, that the complaint did not appear to have been made by the parish where the child was born, but the contrary rather appeared, for it was stated, that she was a casual poor. 13 East, 57. — 8. So it need not state that the defendant was summoned, since that will be intended. 3 East, 58. — 9. An order described

At least by words tantamount, which are sufficient: as, if it says, to pay so much expended by the parish. 1 Vent. 37.

If a woman have an husband beyond sea, it ought to shew, that the husband was absent for the whole time. R. 1 Sal. 122.

It must make an adjudication(o) that such a one is the putative father. Semb. 1 Sid. 363.

And both the justices must make the examination and adjudication. R. 1 Sal. 122. 478. (p)

It must give relief weekly, as the statute speaks; for so much per month, is bad. 1 Sid. 222.

It must give a reasonable relief; and therefore 2d. per week, unless it be in part only, is bad. 1 Sid. 363. (q)

The relief ought to continue only while the bastard continues chargeable: and therefore, till the bastard be fourteen, is bad; for the father may maintain it. 1 Sid. 222. Per Twisd. 1 Mod. 20. R. 1 Vent. 48. R. 1 Sal. 121. 478. 480. Q. 1 Vent. 336.

Or, till the bastard, by his labour, maintains himself. 1 Vent. 210.

So, if an order be, to pay a sum in gross. 1 Vent. 336. unless it be for charges expended. 1 Sid. 326. Sal. 124. (r)

Or, for the maintenance of two bastards; for one of them may die. P. 3 W. & M.

Or, to pay the charge of the midwife; unless it be satisfied by the parish. 1 Vent. 210. (s)

described to have been made (as well) "upon the oath of the wife as otherwise," is good. 8 East, 193.

(n) Order states that the child is "likely to become" chargeable to the township; awards, that the putative father pay a certain gross sum towards the lying-in expences and maintenance of the child up to the time of making the order. Objected, 1. The language of the 18 Eliz. c. 3. s. 2. only concerns bastards who are "actually" chargeable, for the language of the preamble is, "the said bastards being now left to be kept at the charges of the parish where they are born, &c." therefore the order should have stated that the child was "actually" chargeable. 2. It was not alleged that the gross sum awarded had been expended, or was a necessary sum. 3. The order is made on the complaint of the overseers of the township, but it does not appear that this is a township which maintains its own poor; and if it be not, the order cannot be made. But held, 1. That the case in 8 East, 193. was an answer to the first objection. 2. That supposing the second to be valid, it would only operate against the order *pro tanto*, leaving that part which directed future weekly payments unimpeached. 3. That the requisite fact appeared by necessary inference; for unless the township maintained its own poor, there could be no overseers. 4 M. & S. 559.

(o) 1. An order of bastardy, stating, whereas it hath appeared to us, &c. without an express adjudication that the person charged is the putative father, is void. Dougl. 662. — 2. And if the order states, that the husband had been absent six years, and during his absence, A. had carnal knowledge of the wife, and therefore they adjudge him the putative father; it is bad, for that is not a sufficient reason. Str. 811. — 3. Two justices cannot acquit a man charged with being the father of a bastard, though the sessions may. Str. 1050. B. R. H. 301. — 4. If defendant is discharged on appeal, he cannot be charged by a new order. Str. 716. Ld. Raym. 1423.

(p) 2 Blk. 1017.

(q) An order to pay so much a week till the child is nine years old, if he so long live, is good. Str. 788.

(r) An order awarding a gross sum to be paid for the midwife and other charges, and for the past maintenance, &c. is good. 6 T. R. 148.

(s) In an order of filiation, the justices can direct the defendant to pay the costs of obtaining it. 9 East, 25.

Or,

Or, to give such security as the churchwardens shall think fit. 1 Sid. 222.

It must direct the security in the disjunctive, *viz.* to perform their order (*t*), or appear at the next sessions, and obey the order there. 2 Bul. 343.

And if the putative father refuse such security, one of the two justices, or the sessions, upon an original order made there, though not upon an appeal, may commit him. 2 Bul. 341. 343. 1 Sal. 122.

The putative father ought to be summoned before the order made. 2 Mod. Ca. 4. (*u*)

But an order may be, to pay so much weekly to the overseers. R. Sal. 122.

To pay a sum in gross for the charges of the midwife, or maintenance, before expended by the parish. 1 Sid. 326. Sal. 124. R. 2 Mod. Ca. 4.

The sessions, upon an appeal, may repeal or confirm the order of two justices.

Or, if it be not conformable to the authority given to the justices of peace by the statute, it may be quashed, being removed into B. R. by *certiorari*. (*x*)

So it may be quashed for part, and affirmed for the residue. R. Cro. Car. 471. R. 1 Sid. 150. (*y*)

But it shall not be quashed till security given by the party, to appear at the next sessions of the peace, where the court may make another order upon him. R. Sal. 477, 478. (*z*)

A person suspected as the father of a bastard, may be bound to good behaviour after, or before the birth, and before an order against him. Dalt. 39.

By the st. 7 Jac. 4. the justices of peace may commit the mother of a bastard, which may be chargeable to the parish, to the house of correction for a year; and if she offend again, then till she find sureties for her good behaviour.

But she shall not be committed for life, or if the bastard is not a

(*t*) 1. A party is not compellable to find sureties for performance of an order in bastardy made upon him. 6 T. R. 143. — 2. Nor under a recognizance, taken pursuant to stat. 6 Geo. 2. c. 51. from the putative father of a bastard child, conditioned to appear at the next sessions and perform such order as should be made in pursuance of st. 18 Eliz. c. 3. can the sessions oblige him to find sureties for performance of their order. 6 T. R. 147.

(*u*) And if being summoned he does not attend, the justice need not hear any evidence for him, and B. R. never allows exceptions to such order, unless the party attends in person. B. R. H. 112.

(*x*) Sessions' order to maintain a bastard, not setting forth that it was born in the county, shall be quashed; but the court will bind over defendant to appear at sessions. B. R. H. 364.

(*y*) A magistrate's order, nothing *in natura rei* opposing, is divisible; so that it may be quashed as to part, and stand as to the remainder. Thus, if an order of filiation in bastardy, award a gross sum towards expences already incurred, and a weekly payment towards future charges, and the manner of the former award be formal, the latter is not thereby vitiated. 4 M. & S. 559.

(*z*) 1. Therefore defendant must appear in court, when an order of bastardy is quashed. 1 Bl. Rep. 198. — 2. If an order to pay so much per week, by the quarter sessions, is removed into B. R., and confirmed, and defendant does not pay, it is a contempt, and the court will grant attachment. B. R. II. 160.

charge to the parish, nor for the second offence, before conviction for the first. R. Cro. Car. 471. 2 Bul. 349.

By the st. 14 Car. 2. 12. s. 19. if the mother, or putative father leave the bastard upon the parish, the churchwardens and overseers may seize his or her goods, and rents of lands, by order of two justices confirmed at the sessions, and may sell such goods for relief of the parish. (a)

BATTELL.

(A) Battle. p. 269.

(A 1.) Trial by it; when allowed. p. 269.

(A 2.) In a writ of right. p. 269.

(A 3.) Trial by the grand assise. p. 270.

(B) Duel. p. 270.

(A) Battle.

(A 1.) Trial by it; when allowed.

Trial by battle was allowed by many of the northern nations. Dug. Or. Jud. 65.

And now, in an appeal of death, the defendant may join issue by combat. Vide Cro. El. 69. Vide Appeal, (G 8.)

And though one of them pleads to the country, the other defendant may join issue by battle. R. Dy. 120. a.

So, upon an accusation in the court of chivalry, the defendant may join issue by battle. Dug. Or. Jud. 76. 2 Rush. 113, 114, &c.

After issue joined by battle, if combat becomes impossible by the act of God, or default of the appellant, the appellee shall be acquitted. 3 Inst. 159.

As, if the appellant become blind; for then he shall be discharged from the battle. 3 Inst. 158, 159.

But it is not a cause for refusal of trial by battle after issue joined, and the champions allowed, and surety given for appearance at a day to which the court is adjourned, that upon examination it appears, the champions are hired. R. per J. 2 Rush. 790.

(A 2.) In a writ of right.

In a writ of right, if the tenant wage battle upon the mere right, it must not be done by the demandant, or tenant, in proper person; for then judgment should not be given if one be killed, for the writ abates; but it must be by their champions. Dy. 301. b. Vide in Droit, (C 5.)

(a) 1. The mother, not the father, is entitled to the custody of the child. 5 T. R. 278. 5 East, 224. 1 N. R. 148. 4 Taunt. 498. — 2. But query, if the father is fairly in possession, whether the court will enforce the mother's claim? 5 East, supra.

And the champion must be a free man.

If the champion, after battle waged, be disabled by blindness, &c. he shall be discharged. 3 Inst. 158.

(A 3.) Trial by the grand assise.

If the *mise* be joined in a writ of right, to be tried by the grand assise, the demandant must sue out a writ to summon four knights to elect the grand assise. Vide Droit, (C 5.)

The four knights appearing, *gladiis cincti*, must return in a pannel, the names of 20 others, with themselves; and thereupon a *venire facias* shall be awarded against the parties. 1 Leo. 303.

The demandant and tenant shall be present with the four knights, when they make their return, to make their challenges, if necessary; for after their return, no challenge lies to the polls. 1 Leo. 303.

At the day of return, the four knights, and twelve others of the pannel shall be sworn, to try the issue. 1 Leo. 303. The four knights are sworn, to say, which has the better right; and afterwards the other jurors are sworn generally, as in other actions. 3 Leo. 162.

After issue joined, the champions find mainpernors for their appearance at the day fixed. Dy. 301. b.

And then they must appear with bare heads, bare legs, and bare arms from the elbow, introduced by two knights. Dy. 301. b.

At the place fixed for their appearance, the court sits upon a bench, with a bar for the serjeants. Dy. 301. b.

If the demandant does not appear, there shall be final judgment against him. Dy. 301. b. Vide Droit, (C 6.)

(B) Duel.

But a duel, without authority of law, is punishable as homicide, if death ensues.

So, if death do not ensue, the engagement was punished by censure in the star-chamber, and the party shall be fined and imprisoned, and bound to his good behaviour. 3 Inst. 157, 8.

So the challenge was punishable in the star-chamber. 3 Inst. 158.

And it will be a breach of the peace, if it be made by word, message, or writing. 3 Inst. 158.

So if a sheriff, justice of peace, constable, or other peace officer, see a duel, or affray, he ought to endeavour to part, and apprehend the parties, otherwise he shall be fined and imprisoned. 3 Inst. 158.

So if he prays assistance of any who are present, and they refuse, they shall be fined and imprisoned. 3 Inst. 158.

So every by-stander, though he be not an officer, may endeavour to part them, and shall have a remedy, by action, if he be struck, or hurt in his endeavour. 3 Inst. 158.

If any be killed, or thrown down as dead in such affray, every by-stander ought to endeavour the apprehending of the offender, otherwise he shall be fined and imprisoned. 3 Inst. 158.

BATTERY.

(A) Battery; what shall be. p. 271.

(B) What shall be a mayhem. p. 275.

(C) What only an assault. p. 275.

(D) Or, a threat, etc. p. 276.

(E) Remedy. p. 277.

(E 1.) By action. p. 277.

(E 2.) By indictment. p. 277.

(E 3.) When the damages shall be increased for a mayhem. p. 277.

(E 4.) By appeal. p. 278.

(A) Battery ; what shall be.

A battery may be upon the person of a man, by striking (*a*) him with an hand, or some instrument.

A fortiori, if he wounds him.

So if a man thrust, or push another in anger. Per Holt, Mod. Ca. 149.

Or hold him by his arm.

Or spit in his face. R. Mod. Ca. 172.

So if he strike a horse upon which the party rode, whereby (*b*) he is thrown. 1 Mod. 24. R. Jon. 444.

If in a struggle for the way, or other contest, he touch him. Mod. Ca. 149.

If a man strike a feme covert, the husband and wife may maintain trespass for this battery.

So the husband alone, for a battery, *per quod consortium uxoris amisit*. 2 Rol. 556. l. 40.

Or for a menace and battery of the wife, *per quod negotia sua infecta remanebant*. R. 2 Rol. 556. l. 45.

But it is not a battery, if a man deliver a *subpœna* to another. R. 2 Rol. 546. l. 11.

If he comes in aid of an officer, who has a warrant against A., and lays his hand upon A. and says to the officer, This is the man. R. 2 Rol. 546. l. 7.

(*a*) Be it ever so slight. Ld. Rd. 955. 5 Mod. 172.

(*b*) 1. So if a man whips the horse upon which another is riding, and makes it run away, the person who whips it is guilty of a battery, upon any person against whom the horse may run. Ld. Rd. 38.—2. So if A. takes the hand of B. and strikes C. therewith, against B.'s will, A. is guilty of the battery, B. not. Ld. Rd. 38.

So a battery is excused by inevitable necessity (*d*); as, (*e*) if a soldier, in muster, discharge his gun, and another go cross, whereby he inevitably, and against his will, hurts him. 2 Rol. 548. G. Hob. 134. Mo. 864.

Otherwise, if it does not appear to be inevitable, and without any neglect in the party. R. 2 Rol. 548. G. Hob. 134. R. Mo. 864.

So a battery may be justified, in his own defence.

Or for defence of his wife (*f*), servant (*g*), or master. (*h*) 2 Rol. 546. D.

(*d*) 1. It may be laid down as a general proposition, that where one man has been the occasion of *damage* to another, in order to constitute such damage an *injury*, it is essential that some degree of blame be imputable to the party producing it, and that no one can in any shape be made amenable for consequences which his prudence could not avert. — 2. Hence the terms *inevitable necessity*, *unavoidable accident*, and their equivalents, to be met with in the books. — 3. Nor is this rule open to any abuse; for so anxious is the law to preserve unimpaired the rights of personal safety and of property, that it regards not those acts only which through design invade them to be injurious, but likewise all others, that without the concurrence of evil disposition, through carelessness and neglect, infringe them; characterizing a man's conduct, as negligent and careless, if by any extraordinary degree of circumspection, greater than is usually practised in the ordinary affairs of life, he might have guarded against the accident. 6 Edw. 4. pl. 18. pa. 7. 21 Hen. 7. M. 45. pa. 36. — 4. So that where to an action of assault and battery, the defendant pleaded, that the plaintiff and himself were soldiers at exercise, skirmishing with their muskets, and that in so doing the defendant *casualiter et per infortunium, et contra voluntatem suam*, in discharging his piece, wounded the plaintiff; on demurrer the plea was held bad; for, said the court, a man shall not be excused a trespass, except it has been committed *utterly* without his fault. Hob. 134. — 5. So where the defendant in uncocking a gun discharged it, and thereby wounded the plaintiff who stood by looking on, it was decided that the latter might maintain trespass. Str. 596. *Vide etiam* Cro. Eliz. 10. — 6. This general rule, however, is not without its exceptions, one of which is discovered in the case where an officer innocently executes the process of a court, having no jurisdiction in the matter. — 7. And with respect to the rule itself: one of the expressions alluded to as an equivalent to inevitable necessity and unavoidable accident is *involuntary* trespass. Poph. 162. — 8. Whereby is not intended, that to constitute a trespass the defendant must design an injury to the plaintiff, but it is to be interpreted in this limited sense; — the defendant must at the time have a command over his will and actions, otherwise he is not a trespasser; and when the reverse of this happens, then, and not till then, is he excused rendering to the plaintiff a compensation for the damage he *involuntarily* occasioned. — 9. A man may in the eye of the law be deprived of all controul over his will in three ways; either by the motive of self-preservation, by that of preserving others from destruction, or by the visitation of God, namely, in the cases of *idiotcy* and *madness*. — 10. It is difficult upon principle to discover any distinction between the instance last supposed and the two former cases; however, authority has declared, that if a lunatic hurt a man, he shall be answerable in trespass. Hob. 134. — 11. In order likewise to render a trespass excusable, not alone must the act itself have been inevitable, the party must be altogether blameless with regard to the circumstances which led to it; for if the defendant has wrongfully placed himself in a situation whereby he becomes the instrument of mischief to another, he cannot excuse himself by saying that the accident happened without the possibility of his preventing it at the time. — 12. Thus if two closes adjoin, and the owner of one is bound to repair the dividing fence; if, in consequence of its decayed state, the cattle of a stranger, feeding without right in the close adjoining, stray into the other, they are trespassers. 3 Wils. 126.

(*e*) Where a man was riding along the highway, and his horse, on a sudden fright, ran away with him, upon which he called to J. S. to get out of the way, which he neglected to do, in consequence of which the horse ran over him, the court held that the rider was not guilty of battery. Ld. Rd. 38.

(*f*) 1. 3 Salk. 46. — 2. His child. 9 Edw. 4. Hil. 4. p. 48.

(*g*) 19 Hen. 6. M. 59. p. 31. Easter, 5. p. 66. Owen 150; *sed vide* 1 Salk. 407.

(*h*) 1. 21 Hen. 7. M. 50. p. 39. 35 Hen. 6. Hil. 15. p. 51. 14 Hen. 6. Trin. 72. p. 24. — 2. So the wife, her husband. Ld. Rd. 62. — 3. And the child its parent. 3 Salk. 46.

Or

And that, upon the first assault, before (i) a stroke given. 2 Rol. 547. l. 37.

If he cannot otherwise escape; for he ought to go as far from him as he can. 2 Rol. 547. l. 35.

Or for defence of his goods (k); as, if a man will take my money. 2 Rol. 549. l. 7. 10.

Or beasts which are distrained damage-feasant. 1 Rol. 549. l. 12.

Or for defence of his possession (l); as, if another enter his house. R. 2 Rol. 548. l. 25. 43. (m)

Or for correction of his son. 2 Rol. 546. (n)

(i) 1. The party need not wait until a blow has been given, for then he might come to late, and be disabled warding off a second stroke from his own person, or effectually protecting that of the party assailed. — 2. Care, however, must be taken that the battery transgress not the bounds of necessary defence and protection, for it is only permitted as a means to avert an impending evil, which might otherwise overwhelm the party, and not as a punishment or retaliation for that injurious attempt. — 3. Therefore where to an action of battery the servant pleaded that the plaintiff *having assaulted* his master in his presence, he, in defence of his master, struck the plaintiff; the plea was, on demurrer, held bad, for the assault on the master might be over, and the servant cannot strike by way of revenge, but only in order to prevent an injury. Str. 593. — 4. The degree of force necessary to repel an assault will necessarily depend upon and be proportioned to the violence used by the assailant; but with this limitation any degree is justifiable. 33 Hen. 6. Easter 10. p. 18. Ld. Rd. 177. 2 Salk. 642.

(k) 1. With regard to the defence of personal property, it seems a reasonable doctrine to hold, that if the plaintiff is in the act of taking peaceable possession of the defendant's goods, the latter may nevertheless lay hands upon him without first praying him to desist; otherwise they may be lost past recovery. — 2. The authority, however, goes thus far only; if one comes forcibly, and takes away my goods, I may oppose him without more ado, for there is no time to make a request. 2 Salk. 641. — 3. And again, if a man takes your goods you may immediately retake them. 19 Hen. 6. M. 59. p. 31. — 4. It seems to have been admitted in this case, that if one man is wrongfully in possession of another's chattels, the latter may, after demand made, repossess himself by force. Cro. Jac. 256.

(l) 1. But the following rules must be observed. — 2. If the plaintiff is in the act of entering peaceably upon the defendant's land, or having entered, is discovered not committing violence, a request to depart is necessary in the first instance. 2 Salk. 641. — 3. Whereupon, if the plaintiff refuses, the defendant may then, and not till then, gently lay his hands upon the plaintiff to remove him from the close; and for this purpose may use, if necessary, any degree of violence short of striking the plaintiff; as by thrusting him off; for the law, by allowing the preliminary steps mentioned before to be taken in order to redress, sanctions all others which in reason may be essential to render the first attempt effectual. Skin. 228. — 4. If the plaintiff resists, the defendant may oppose force to force. 8 T. R. 78. — 5. But if the plaintiff is in the act of forcibly entering upon the land, or having entered, is discovered subverting the soil, cutting down a tree, or the like, a previous request is unnecessary, and the defendant may instantly lay hands upon the plaintiff; for the time employed in requesting him to desist would add to the destruction of the property. 8 T. R. 78.

(m) So if the plaintiff attempts to divert a stream of water, to the use of which the defendant is entitled, he may be prevented.

(n) 1. Or of his wife, his servant, his scholar, or, being an officer, one under his command. 21 Edw. 4. East 17. p. 6. 1 Vent. 70. 12 Mod. 504. 1 Camp. 60. — 2. In all which cases, except the last, the chastisement must not exceed a moderate correction. Keilw. pl. 120. pa. 136. — 3. But in the last case any degree of violence is justifiable if the occasion demands it; so that an officer of the army may justify even a mayhem, if done by him, for a disobedience of orders. B. N. P. 19. — 4. And the sentence of a council of war, dismissing a charge preferred against him by the plaintiff, will be conclusive evidence in his favour. Ibid. 5. And many acts may be done by an officer in situations of difficulty and danger, which could not be defended under ordinary circumstances. Vide Cowp. 175. — 6. Yet an inferior military officer may have trespass against his superior officer, both being under martial law, who imprisons him for disobedience to an order made under colour, but not within the scope of military authority, and this though the imprisonment be followed by a court-martial. 4 Taunt. 67.

So if a man resist a parker. R. upon the st. 21 Ed. 1. *de malef. in parcis*. 2 Rol. 548. l. 32.

Otherwise, if he does not resist. R. 2 Rol. 548. l. 30.

So it is a justification of a battery, if any apprehend a criminal, to bring him to justice. 2 Rol. 546. l. 30. (o)

Or if a man hold another, to restrain him from mischief. R. 2 Rol. 546. l. 40. (p)

But a man cannot justify a battery, for a disturbance in building a booth. 2 Rol. 548. l. 40.

Nor a battery with wounding, in defence of his possession. 2 Rol. 548. l. 35.

Nor a battery, by throwing stones *molliter* against a trespasser. R. 2 Rol. 548. l. 45. (q)

(B) What

(o) 1. By one authority it is affirmed, that every man may arrest a night-walker (of suspicious appearance and demeanour), because the act is done for the public good. 4 Hen. 7. M. 12. p. 18. — 2. By another it is declared, that the watchman assigned in the vill alone have that authority. 4 Hen. 7. Hil. 2. p. 2. — 3. In a third case, the defendant pleaded, that he was sheriff of London, and about nine at night was in pursuit of a prisoner who had escaped; that the plaintiff hindered and abused him, and pushed him against the wall; wherefore finding the plaintiff wandering in the street, for this reason and for his misdemeanour towards him, he imprisoned him; to which the plaintiff objected, that although the sheriff was at common law a conservator of the peace, and might, notwithstanding he was not a magistrate, imprison for good cause, yet that he could not arrest a night-walker, but the watchman appointed ought to do it: the court held that upon the whole matter the justification was good. 2 Rol. Rep. 237. — 4. In a recent case it was adjudged, that watchmen have authority, at common law, to arrest and detain in prison for examination persons walking in the streets by night, whom there is reasonable ground to suspect of having committed felony, although there is no proof of a felony having been committed. 3 Taunt. 14; vide etiam 15 Hen. 7. M. 10. p. 10. Hearn, 488, 489. 22 Edw. 4. M. 2. p. 22. 2 Edw. 4. Easter 20. p. 8. 2 Sid. 91. — 5. Upon one occasion it was decided, that any person may arrest and carry before a magistrate a common gambler, whom he detects cheating with false dice. Cro. Car. 254. — 6. Any one may arrest another upon suspicion of felony, provided a felony has actually been committed, that the one has reasonable ground for suspecting the other to be the criminal, and lastly that the party making the arrest himself entertained the suspicion. 5 Hen. 7. M. 10. p. 4; 2 Hen. 7. M. 12. p. 3. 7 Hen. 4. Hil. 3. p. 55. — 7. What shall be accounted a reasonable ground for suspicion must necessarily depend upon the circumstances of each individual case. — 8. A common fame that the person apprehended is guilty, is one ground. 7 Edw. 4. M. 19. p. 20. 5 Hen. 7. M. 10. p. 4. Dyer 236. pl. 26. — 9. Any private individual may arrest a felon. H. P. C. 89. — 10. And it is lawful for every man to lay hands upon another to preserve public decorum; as to turn him out of church, and prevent him disturbing the congregation, or a funeral ceremony. 1 Mod. 168. vide etiam 1 Lev. 196. 2 Keb. 124. — 11. As a secretary of state, a man may arrest and commit for high treason, because he is a sentinel who watches for the public good, and is at common law a conservator of the peace. Ld. Rd. 65. Str. 2. — 12. And he may commit without deposition first made upon oath, for he has no authority to administer one. Ibid. 5 Mod. 278. Skin. 596. Vide Wils. 275. — 13. It should seem, that any conservator of the peace may apprehend a street walker, whether by night or by day, and carry her before a magistrate, on the ground that she has broken it; the word peace importing not merely a state of repose and security as opposed to one of violence and warfare, but likewise a state of public order and decorum. Vide 12 Mod. 566. 3 Taunt. 15. — 14. And the neighbours are bound to lend their assistance. 12 Mod. 566.

(p) 1. And therefore if the plaintiff assaults, or is fighting with another, the defendant may lay hands upon and restrain him until his anger is cooled. 2 Rol. Ab. 559. (E) pl. 3. — 2. But he cannot strike him, in order to protect the party assailed, as he may do in self-defence.

(q) In trespass for throwing water upon the plaintiff, and into her apartment, the defendant pleaded, that the plaintiff had begun wrongfully to block up the defendant's window

(B) What shall be a mayhem.

But, if a man wound another, *per quod redditur inutilis ad pugnandum*, it shall be a mayhem. Co. L. 126. b. 288. a.

As if he cut off his hand, or leg. H. P. C. 133. Co. Ent. 52. c. Co. L. 288. a.

Or if he break his leg. 2 Inst. 313. Hard. 408.

If he cut the veins and sinews, whereby the party loses the use of his fingers. 1 Leo. 318. Co. Ent. 52. a.

Or cut off his thumb, or any of his fingers. 1 Leo. 139. Co. L. 288. a.

Or strike off his arm. Co. L. 288. a.

Or if he does any thing, whereby he loses the use of any such member. Co. L. 288. a.

So if *virilia alterius abscindit, aut castravit*. 3 Inst. 63. 118.

So if he beat out his teeth. H. P. C. 133. Dub. 2 R. 3. 13. b. Co. L. 288. a.

If he cut him across the nose, whereby he loses his smelling. Dub. 2 R. 3. 13. b.

So if he put out his eye. Co. L. 288. a.

If he break his skull. Co. L. 288. a.

But cutting off an ear is no mayhem. H. 133.

Mayhem is justified in defence of his life. 2 Rol. 547. l. 40.

Or member. Co. Ent. 52.

(C) What only an assault.

If a man strike at (*r*) another, and do not touch him, it is no battery, but it will be an assault. 2 Rol. 545. l. 45.

So if he lift up his weapon to strike, but does not. R. 1 Vent. 256. D. 1 Sal. 79.

window in a house contiguous to the plaintiff's room; that he prayed her to desist, and upon her refusal threw a little water into the room to hinder, &c.; which plea was held bad. 4 Taunt. 821.

(*r*) 1. As with one's hand, or a cane; by setting on a dog, and so forth. — 2. It is said, that in order to constitute an assault, a design or intention to injure must concur with the act. — 3. But the rule, perhaps, will be found to be this; if the defendant's demeanour naturally impressed the plaintiff with the idea that he was about to strike him, it is an assault, notwithstanding his real intention was to do him no mischief. — 4. Which position will not in the least impugn the decision of *Redman v. Edolfe*, 1 Mod. 3. usually cited to support the other way of thinking. — 5. That case was thus; the defendant laid his hand upon his sword, saying to the plaintiff, if it were not assize time, I would not take such language from you; it was adjudged that the act did not amount to an assault, for in that the intention to injure is an essential ingredient, and here it was wanting. — 6. In the case of an assault, the *damage* consists in the inconvenience produced by the fear which the act impresses upon the plaintiff's mind. — 7. And as such impression can only arise where the attempt to injure is coupled with a present ability, the plaintiff must be placed within reach of the offensive means, or he has not been injured. — 8. Thus, if the assault consists in lifting up one's fist, in a threatening manner, the plaintiff must stand within reach of a blow; if, in pointing a gun at the plaintiff, he must stand within range; in which latter case, however, the circumstance of the gun being unloaded can make no difference, provided the idea of an assault hazarded before, is the true one, and provided also that the plaintiff is unawares of the fact.

If he throws stones, water, or other liquor upon him. Reg. 108. b.

So if he surround his house with intent to beat him.

If he use menacing words to him in his presence, whereby he dares not stay in the town. 2 Rol. 545. l. 41.

As if he threaten that he will cut off his arm, &c. for a threat seems to amount to an assault. 2 Rol. 545. l. 20. to 40.

Or hold him by his arm. 2 Rol. 545. l. 23.

Or deliver a subpoena to him. 2 Rol. 545. l. 47.

But it is no assault, if a man speak menacing, or provoking words against another, in his absence.

Or strike at him at such a distance that he cannot touch him, or put him in fear.

Or in order to restrain him from a mischief to himself: as, to hold one by his arm, who would stop his water, throw down his booth, &c. 2 Rol. 547. l. 13. 15.

Or from mischief to another: as him that excites a dog against another. 2 Rol. 546. l. 41.

A man in a passion, &c. 2 Rol. 546. l. 27.

So if he assault another for decency: as, if a churchwarden take an hat from a man's head in a church. R. 1 Sand. 14.

If the plaintiff declares for an assault and battery, he may recover for his assault only (s), though the declaration cannot (t) be singly for the assault. Kit. 38. a.

(D) Of a threat, &c.

So trespass lies, if a man threaten another with his life and members, *ita quod ad propria venire non audet*. Reg. 104. b. 2 Rol. 545. l. 41.

Or threaten to pull down his house, *quousque finem fecerit*. Reg. 108.

Or if he says, that he will cut off his arm, &c. 2 Rol. 545. l. 25.

That if he call him traitor, he will defend himself upon his body, and kill rather than he will be killed. 2 Rol. 545. l. 27.

Or will defend himself during the life of one of them. 2 Rol. 545. l. 30.

So if he says, that if he come out of the church, &c. and speak so, he will beat him, &c. 2 Rol. 545. l. 37.

So if he threaten a battery, unless he cease a suit against him. 2 Rol. 545. l. 35.

So if he attempt *per insidias ad interficiendum, vel mayhemandum*. Reg. 102. a.

But it is no threat to say, that he will defend himself during the life of one of them, according to law. 2 Rol. 547. l. 20.

So a threat is not a trespass, if no inconvenience ensues.

(s) An action lies for an assault alone. 45 Edw. 3. Trin. 35. p. 24. 22 Ass. 60. p. 99. 4 Hen. 6. Hil. 2. p. 10. 3 Hen. 4. Hil. 3. p. 9. 1 Vent. 256. 2 Lev. 102.

(t) However where a plaintiff declared as well for a battery as for an assault, and proved the latter only, the court gave him judgment as to the assault, and amerced him, *pro falso clamore*, as to the battery. 40 Edw. 3. M. 40. p. 19.

(E) Remedy.

(E) Remedy.

(E 1.) By action.

For a threat, assault, battery, or mayhem, the party shall have a remedy by action of trespass, *quare minas imposuit ita quod*, &c. Lut. 1428.

Quare in ipsum insultum fecit et ipsum verberavit, &c. F. N. B. 86. l.

And such is the form, though he does not wound him. F. N. B. 86. K.

Quare in ipsum insultum fecit, verberavit, vulneravit, et imprisonavit, &c. F. N. B. 86. K.

Quare cepit, imprisonavit, et in prisona quousque finem, &c. *fecisset, detinuit*. F. N. B. 86. K.

As to the declaration in trespass, for battery, &c. and the pleas to it, Vide in Pleader, (3 M. 3, &c. 11, &c. 15, &c.)

(E 2.) By indictment.

So mayhem is the greatest offence under felony. Co. L. 127. a.

So for a mayhem a man may be indicted, fined, and ransomed. Co. L. 127. a. b. 3 Inst. 63.

Though the mayhem be done by himself. Co. L. 127. b.

Though the person be his vellein, who cannot maintain an action for it against his lord. Co. L. 127. a.

So an indictment lies for an (*u*) assault, battery, or imprisonment of a subject.

(E 3.) When the damages shall be increased for a mayhem.

If the declaration mention a mayhem, the court, upon view of the mayhem, may (*x*) increase the damages given by the jury. 1 Rol. 572. l. 10. 15. R. 1 Leo. 139.

Though the particular part in which the mayhem was be not specified. R. Hard. 408.

So in battery, where the manner of the battery is described, the court, upon view, may increase the damages. Per Hale, Hard. 408.

So the court may increase damages, upon view and examination of witnesses, where the declaration is general *quod maihemavit*, without making any description of the mayhem, if the judge of assize certify the particulars of the mayhem, or be in court and affirm, that the particulars now proved were given in evidence at the trial. 1 Sid. 108. (*y*)

But where the declaration does not mention a mayhem, nor describe the manner of the battery, the court cannot increase the damages upon view. Hard. 408.

So if the mayhem was not the act of the defendant directly, but by an horse, after the plaintiff was thrown down by the defendant. R. 1 Sid. 433.

Or by a gun, which the defendant let off, and which maimed the plaintiff against his will. R. 1 Sid. 108.

(*u*) 1. Distinct assaults may be included in one and the same indictment. 2 Burr. 984. Denying Ld. Rd. 1572. 2 Str. 870. — 2. And where an indictment consisted of two counts, one for a riot indorsed *ignoramus*, the other for an assault returned *billa vera*, it was held good. Cowp. 325.

(*x*) But it is discretionary. 1 Wils. 5.

(*y*) On view of the plaintiff, who had almost lost his sight, and on examination of a surgeon, damages were increased from 11*l.* to 50*l.* Barnes, 153.

So if the declaration be general *quod maihemavit*, without describing how, and the judge does not certify it. 1 Sid. 108.

(E 4.) By appeal.

So he may prosecute his appeal of mayhem. Han. Ent. 270. Co. Ent. 50. c.

And the writ of appeal, and indictment shall say, *quod felonice maihemavit*. 3 Inst. 63. 118.

To an appeal of mayhem, the defendant may plead not guilty. Han. 271.

So if he did it *se defendendo*, he may plead in bar, *son assault demesne*. Han. 271. 277. Co. Ent. 52.

And he must plead it; for he cannot give it in evidence upon not guilty. 2 Inst. 316.

So the defendant may plead a release of the mayhem.

Or, of all actions personal; for the damages only are recovered in such appeal. Lit. s. 502.

So the defendant may plead 20*l.* or other sum given in satisfaction. Han. 274.

A recovery in trespass for the same mayhem. Co. Ent. 50. b.

BEACONS.

Vide NAVIGATION, (H.)

BEASTS.

Vide CHASE, (E — F.) — DISMES, (H 5. &c.)

BEAU-PLEDER.

Vide PREROGATIVE, (D 52.)

BENCH.

King's Bench. Vide COURTS, (B 1. &c.) — PLEADER, (C 3. 8. &c. — 3 B 3.)

Common Bench. Vide COURTS, (C 1. &c.) — PLEADER, (C 4. 11. &c. — 3 B 2.)

BERWICK.

Vide SCOTLAND, (B.)

BESAIEL.

Vide ASSIZE, (D.)

BIENS.

BIENS.

(A) Goods and chattels.

(A 1.) Real. p. 279.

(A 2.) Personal. p. 279.

(B) What go to the heir. p. 280.

(C) What go to the executor or administrator. p. 281.

(D) Property of goods; how vested. p. 282.

(D 1.) By succession. p. 282.

(D 2.) By grant. p. 282.

(D 3.) By sale. p. 284.

(E) When the property is not vested. p. 288.

(F) What things are nullius in bonis.

Fera natura. p. 289.

(G) Emblements.

(G 1.) What are. p. 290.

(G 2.) Who shall have them. p. 290.

(H) Trees. p. 292.

(A) Goods and chattels.

(A 1.) Real.

Goods and chattels are real or personal. Co. L. 118. b.

Chattels real are such as concern a real estate; as a term for years. Co. L. 118. b.

The guardianship of a ward. Off. Ex. 74.

Whether it belong to one by tenure, or by assignment of him of whom the lands are holden. Off. Ex. 74.

A villein in gross for a term of years. Off. Ex. 75.

The interest of a tenant by statute staple, merchant, or elegit. Co. L. 118. b.

The grant of the next avoidance. Off. Ex. 76.

The year, day, and waste, where any one is attainted of felony. Off. Ex. 76.

(A 2.) Personal.

Chattels personal are cattle, household stuff, &c. Co. L. 118. b. Off. Ex. 79. 81.

All fowls tame, or reclaimed. Off. Ex. 81.

So deer, conies, &c. tame. Off. Ex. 81.

So fish in a trunk, &c. Co. L. 8. a. Off. Ex. 81.

So tithes severed from the nine parts. Off. Ex. 85. 86.

So trees sold, or reserved upon a sale, and emblements. Vide post, (G 1. 2. — H.)

But the inheritance, or freeholds of lands or tenements *z*) is not comprehended under goods and chattels. Co. L. 118. b.

Yet inheritances in the plantations *a*) are chattels for payment of debts. R. 2 Vent. 358. Vide in Assets, (C.)

(B) What go to the heir.

Goods and chattels annexed *b*) to the freehold go to the heir, and not to the executor, or administrator: as, the glass in a window; the doors and locks of an house. Off. Ex. 86. 21 H. 7. 26. b. 4 Co. 63. b.

So

z) A grant from the king of 1000*l*. per ann. out of the four and a half per cent. Barbadoes duty, with collateral security for payment out of other revenue, is a mere personal annuity, having no relation to lands or tenements, nor partaking of the nature of a rent, but is descendible to heirs. 2 Ves. 170.

a) 1. Personal property, wherever situate, is governed by the laws of that country in which the owner is domiciled. 4 T. R. 182. 2 V. & B. 151. — 2. But real property is regulated by the law of the country where the land lies. 2 V. & B. 151. — 3. And with respect to domicile; the mere place of birth or death does not constitute the domicile; the domicile of origin, which arises from birth and connexions, remains until clearly abandoned and another taken. 5 Ves. 750. — 4. Which cannot be during pupillage. 5 Ves. 787. — 5. For some purposes a man may have two domiciles. 5 Ves. 786. — 6. But in regard to the succession to personal estate, there can be but one; nor does the *lex loci rei sitæ* prevail. 5 Ves. 750. — 7. In the case of cotemporary domiciles, the domicile of a nobleman or gentleman is usually the mansion-house in the country; that of a merchant, his residence in town. 5 Ves. 789. — 8. And in the case of lord Somerville, of two acknowledged domiciles, the family seat in Scotland and a leasehold house in London, upon the circumstances, the former, which was the original domicile, prevailed. 5 Ves. 750. — 9. Intestate domiciled in England, leaving real estates in Scotland, the heir being one of the next of kin entitled to share according to the law of England, not subject to the condition of collating the real estate according to the law of Scotland. 2 V. & B. 151. — 10. Intestate domiciled in England having real estate in Scotland, the real estate charged with a heritable bond, as the primary fund according to the law of Scotland, and not exonerated by the personal estate according to the law of England. 2 V. & B. 152. — 11. T. P. a native of England domiciled in Guernsey, dies intestate, leaving a widow and infant children by her, and also by a former wife. The widow after his death is appointed guardian of the children by the royal court of Guernsey, and in conjunction with another person, who is appointed guardian of the children by the former marriage, sells the property of the intestate, and invests the produce in the English funds; after which she comes to England with her children, and is domiciled there. On the death of some of the children under age, a question arises whether their shares of the property have become distributable according to the law of England, or of Guernsey; and it was held, that the law of England is to govern the succession, the domicile of the children being, according to the opinion of foreign jurats, upon a subject on which our own laws are silent, to follow the domicile of the surviving mothers, where no fraudulent intention can be imputed. But fraud may be presumed, where no reasonable cause appears for the removal. 3 Mer. 67.

b) 1. The general rule is, that a tenant, by annexing any thing to the freehold, abandons his property therein. — 2. This rule obtains with most rigour between the heir and the personal representative, in favour of the inheritance. — 3. Its rigour is somewhat moderated where the claimants respectively are the personal representative of tenant for life or in tail, and the remainder-man or reversioner. — 4. And still greater indulgence is shewn in the instance of landlord and tenant, in favour of the latter. — 5. Upon this general rule, one exception has been grafted in favour of trade; and accordingly when the fixed instrument, engine, or utensil (and the building covering it, falls within the same principle) is used for commercial and not merely agricultural purposes, it is to be accounted personalty; may be removed by the tenant either during the term, or after its determination; or, if he dies, it will go to his personal representative, and not the heir. 3 East, 58. — 6. A tenant sued by a purchaser in ejectment, enters into an agreement that judgment shall be taken by the plaintiff, but

execution

- So the pales, posts, and rails for an inclosure. 12 H. 7. 26. b.
 So furnaces, coppers, &c. fixed to the freehold. R. 21 H. 7. 26. b.
 R. 20 H. 7. 13. b. unless they are severed in the life-time of the testator.
 Semb. 1 Sal. 368. Vide in Execution, (C 4.) in Waste, (D 2.)
 So wainscot fixed to an house. 4 Co. 64. a.
 So pictures, glasses, &c. fixed instead of wainscot. 2 Ver. 508.
 So millstones, &c. fixed to a mill. (c)
 So a term for years to attend the inheritance does not go to the executor, but to the heir. R. 2 Ca. Ch. 156. 160. (d)
 So deer in a park, conies in a warren, and doves in a dovehouse, go with the inheritance to the heir. Co. L. 8. a. 1 Rol. 916. l. 50.
 So, fish in a pond, or piscary. Co. L. 8. a. R. Ow. 20. 1 Rol. 916. l. 45.
 So, apples, and other fruits growing at the death of the ancestor. Off. Ex. 84.
 So, roots, &c. within the soil. Off. Ex. 89.
 So, a coat-armour, pennons, tomb-stone, and monuments in a church, in honour of the ancestor. Co. L. 18. b.
 So, charters, deeds, and other evidences of lands, with the chests in which they are preserved. Vide in Charters.
 So, by custom, goods and chattels may go as heir-looms with the house to the heir. Co. L. 185. b. 18. b.
 And such heir-looms cannot be devised to defeat the heir. Co. L. 185. b.
 As, the antient jewels of the crown. Co. L. 18. b.
 The best bed, table, pot, pan, cart, or other dead chattel, moveable. Co. L. 18. b.
 An antient horn, where the tenure of the land is by cornage. 1 Ver. 273.
 A carroome, or licence by the mayor, to have a cart in London. Semb. 2 Ver. 83.
 What goods go to the wife as paraphernalia, vide in Baron and Feme, (F. 3.)

(C) *What go to the executor or administrator.*

But, generally, all goods and chattels, real (e) and personal (f), go to the executor, or administrator. Co. L. 388. a. Vide ante, (A. 1, 2.) —Assets, (C.)

So,

execution shall be stayed for a certain time. Held, that he was thereby estopped removing fixtures he had erected during the term. 1 H. B. 258. — 7. A tenant entitled to remove fixtures, does not abandon his property therein by not removing them before the expiration of the term; therefore, though he is not justified entering upon the premises after the term has ended, yet is he in removing the fixtures. 2 East, 88.

(c) 1. A cider-mill is personal estate; and goes to the executor. 3 Atk. 14. — 2. Salt-pans go to the heir. 1 H. Bl. 259. n.

(d) If a copyhold is burnt down, and money collected for rebuilding it, lodged in the hands of guardian of tenant in tail, who dies under age, the money shall go to the heir, both because of the entail, and because it was copyhold; but allowance shall be made to his personal representative for the amount of interest of the sum lost, for so long as the infant lived. 1 Ves. 460. Vide in Chancery.

(e) 1. If an executor in trust for an infant changes an estate for years into an estate for lives, and the infant dies intestate, the lease shall go to his administrator, not his heir.

So, statutes, recognizances, obligations, and other securities for money. Vide Off. Ex. 90.

So, a captive, or prisoner taken in war. Vide Off. Ex. 79, 80.

So all chattels of a corporation sole, as a bishop, parson, &c. go to his executor, or administrator, and not to his successor. R. 4 Co. 65. a. 1 Rol. 515. L.

Chattels in action, as well as in possession. 4 Co. 65. a.

Whether such corporation sole be created by charter or prescription. 4 Co. 65. a.

So, if the chattel be granted to him and his successors: as, if a term for years be granted to a bishop, and his successors; his executor, or administrator shall have it. 1 Rol. 515. l. 5. Co. Lit. 9. a. 46. b. 388. a.

If an obligation or other specialty be made to him, and his successors. Dy. 48. a.

But chattels, given to a corporation aggregate, as to a mayor and commonalty, dean and chapter, &c. go in succession. R. 4 Co. 65. a. Vide in Franchises, (F 16.)

So, by custom, a corporation sole may take goods and chattels in succession; as, the chamberlain of London. R. 4 Co. 65.

So, if the president of the college of physicians recover in debt for practising without licence, his successor shall have a *scire facias* upon it. R. 1 Rol. 515. l. 20.

So, if a manor, to which an advowson is appendant, be held of the king, and after avoidance the tenant dies; the king shall present by his prerogative, and not the executor, or administrator of the tenant. Co. L. 388. a.

So, if the bishop dies after avoidance. Co. L. 388. a.

(D) Property of goods; how vested.

(D 1.) By succession.

The property of goods and chattels, which go to the executor, or administrator, immediately upon the death of the testator, vests in them. Vide in Administration, (B 10.)

So, the property of goods, which go to the wife as her paraphernalia. Vide in Baron and Feme, (F 3.)

So, the property of goods, which go to the heir.

(D 2.) By grant.

So, if a man grant (*g*) all his goods, the property vests (*h*) in the grantee. (*i*)

And

heir. 3 P. W. 99. — 2. The rents of an estate descended, belonged to posthumous son only from his birth. 3 Atk. 203. — 3. If a debt is owing to A., and in satisfaction of it his debtor grants him an annuity on lands for his own life, and redeemable; this annuity is part of A.'s personal estate. 1 Ves. 402.

(*f*) Hangings, tapestry, and iron backs to chimneys, belong to the executor. Str. 1141.

(*g*) 1. A gift of money, due on a mortgage and a bond, by the testator some time before his death to a daughter, not sustained upon the circumstances; merely a change

And the grant may be made without deed. Perk. Grant, sect. 57.

If he grant *omnia bona et catalla sua*, all his goods and chattels, real and personal, pass. 2 Rol. 58. l. 17.

So, if he grant *bona sua*, without saying *omnia*. 2 Rol. 58. l. 17.

And by such grant of all his goods and chattels, a term for years, which he has in right of his wife, passes. R. 2 Rol. 58. l. 19.

So, goods which he has as executor. R. 2 Rol. 58. l. 21. 4 Leo. 22. R. 1 Leo. 263.

So, an *interesse termini*, though he adds *bona in custodiâ sua*. R. 2 Cro. 60. Or, *omnia tunc bona sua*. R. 3 Leo. 153.

So, if he grant *omnia bona et catalla sua*, and deliver seisin of goods, which his wife had as executrix, or administratrix, the goods, which his wife had, pass. Semb. 2 Rol. 58. l. 25.

So, by such grant, a term, which he had by an extent upon a statute merchant, passes. 2 Rol. 58. l. 32.

So a bond, and statute, viz. the parchment and paper, pass. 2 Rol. 58. l. 10. Vide Assignment, (C. 1.)

So, by a grant of all his goods and chattels, moveable and immoveable, within such a park, a lease for years, of pawnage in the same park, passes. 3 Leo. 19.

So, by a grant of all his goods and chattels being in such an house, a lease for years of the house, as well as the goods in it, passes. 3 Leo. 19. (k)

But, by a grant of all goods and chattels, trees growing do not pass. 2 Rol. 58. l. 5.

Nor charters, which concern the land. 2 Rol. 58. l. 12.

Nor the chest in which the charters are preserved. 2 Rol. 58. l. 15. (l)

By devise. Vide Devise.

change of the securities from one drawer of a bureau to another, by the wife of the testator by his direction; the fact and the declared purpose proved only by the examination of the daughter claiming the benefit, and the widow discharging herself as executrix by payments under the gift. 9 Ves. 1. — 2. A letter to executors, expressing a consent that a sum of 500*l.* was proper to be given to the daughter of the deceased husband, held not to amount to a gift of so much in the executor's hands, the intention to give not being perfected and carried into execution. 1 Mad. 176. — 3. Quere, whether the interest in money, due upon a mortgage or bond, passes by a mere delivery of the security, as a gift *inter vivos*. 9 Ves. 1.

(A) 1. Where the gift is by parol, a delivery is essential to vest the property. Str. 955. — 2. And if A. promise to give B. 20*l.* the promise is *nudum pactum*; but if he actually pays it, it is a gift, and he cannot recover it back. 2 T. R. 27.

(i) There may be a qualified special ownership, as well as an unconditional one. Thus, if a stable or warehouse be demised, under a restriction against using it as a shop, the tenant is not by reason of this restriction the less a special proprietor during the lease. 4 M. & S. 295.

(k) Gift of bank notes, with executors, for the children of A., is a gift among them. 2 B. C. C. 499.

(l) 1. With respect to a *donatio causa mortis*; the description of it in the Digest, is not correct; the true definition of it is in lege 27, and in Just. Inst. tit. 7. *de donationibus*, where it appears, that it has the nature of a legacy, is liable to debts, and is only a gift on survivorship. 2 Ves. J. 119. — 2. The gift must be in the last illness. 1 Ves. J. 546. — 3. Though it need not be *in extremis*. 2 B. C. C. 612. 3 Mad. 184. — 4. It cannot be by mere parol. 2 Ves. J. 120. — 5. But there must be a delivery. Str. 955. — 6. At least where there is no deed or writing, and quere even then.

2 Ves.

By pledge.

When the property of goods vests by pledge, &c. Vide in Mortgage, (A.)

(D 3.) By sale.

So if a man sell (*m*) his goods to another, the property vests (*n*) in the vendee. (*o*)

Though

2 Ves. J. 120. — 7. Which delivery must be an *absolute* and unconditional delivery of possession to the donee, or a third person in trust for him. 2 Marsh. 532. — 8. And the possession must continue uninterrupted to the time of the donor's death. Ibid. — 9. Yet it has been held than an *absolute* gift to take effect immediately cannot be considered as *donatio causa mortis*. 2 Ves. J. 111; 4 B. C. C. 286. — 10. And that it may be for a particular purpose. 4 B. C. C. 72.

(*m*) 1. Sale of goods is complete, upon order to wharfinger to deliver, communicated to and assented to by him. 7 Taunt. 278. 1 Moore, 29. — 2. Where the terms of sale, as expressed in the sold note sent to the vendee, and communicated to the vendor, are that the quality is to be approved on such a day; the contract is binding on both parties, if not disaffirmed before that day expires. 16 East, 45. — 3. A broker who accepts bills of exchange not for the specified amount of a cargo, but for a gross sum generally, on the cargo being placed in his hands for sale, is pawnee, not vendee thereof. 1 M. & S. 484. — 4. A. agrees to buy, and B. to sell a quantity of "St. Petersburg clean hemp," at a certain price, through the medium of a broker, who acts as agent for both parties. The broker delivers a bought note to A., in which, by mistake, he inserts "Riga Rhine hemp," instead of "St. Petersburg clean hemp," and then delivers a sale note to B., stated correctly according to the original contract. Held that the variance between the two notes was fatal, and no contract arose. 1 Mars. 555. 5 Taunt. 786.

(*n*) 1. When goods are sold, if nothing remains to be done on the part of the seller, as between him and the buyer, before the article is to be delivered, the property has passed. 12 East, 614. — 2. If, by the terms of a contract of sale, further acts touching the thing sold, are to be done by the vendor, to the performance of which it is necessary that he have dominion over the property, the property in the thing sold does not vest in the vendee until the acts are performed: as where the weight of the commodity is to be ascertained, or parcel of a gross commodity separated from the bulk. Hence, where A. having about 18 tons of flax, lying in mats, of unequal or not ascertained weight, at B.'s wharf, sold "ten tons at 118*l.* per ton, to C., the amount to be paid by C.'s acceptance at three months, from this day," and gave the vendee an order on B. for ten tons; C. stopped payment before B. had weighed off the quantity. Held, that A. might stop *in transitu*, and countermand the delivery, since the symbolical delivery by an order on the wharfinger was incomplete, the commodity not being in a deliverable state. 2 M. & S. 597. — 3. Where a chattel is made to order, the property therein is not vested in the (*quasi*) vendee, until finished and delivered, though he has paid for it. 1 Taunt. 518. — 4. A. possessed of 40 tons of oil in one cistern, sold 10 tons to B. who, before it was measured off, sold the same to C., and gave him a written order upon A. to deliver it. C. took the order to A., who wrote thereon "accepted." The delivery is thereby complete. 12 East, 614. — 5. Where the custom of the trade on the sale of oil was, for a cooper employed by the seller to search the casks, and for a broker, on behalf both of buyer and seller, to attend to make a minute of the foot-dirt and water in each cask (for which an allowance is made), and for the casks then to be filled up at the seller's expence, and so delivered; — the property does not pass until these circumstances have taken place. 13 East, 522. — 6. Sugars contracted to be sold at a price per cwt. cannot be recovered by the vendee in trover, until selected and weighed off. 4 Taunt. 644. — 7. A. purchases from the defendant a quantity of oil, which was not to be drawn off, but by agreement was to remain undivided in the defendant's cisterns, and for which A. was to pay a weekly rent for warehouse-room. A.'s bill for the oil being dishonoured, and he became bankrupt; held, that the oil, not having been severed from the defendant's stock, this did not amount to such a delivery as would entitle the assignees of A. to have trover for it. 1 Marsh. 2. 5 Taunt.

Though he suffers them to be in possession of the vendor. Perk. Grant, sect. 92. (*p*)

So if he sell, in market overt, (*q*) goods in which he has no property, without covin, the property vests in the vendee. Vide in Market, (E.)

Though the owner be an infant, feme covert, beyond sea, &c. 2 Inst. 713.

But this does not extend to goods of the king. 2 Inst. 713.

Nor, to a gift in a market ; for it must be a sale upon a valuable consideration. 2 Inst. 713.

Nor, to a sale by covin ; as, if the vendee knew the goods to be another's. 2 Inst. 713.

Or, if the sale be in a back-room, warehouse, &c. 2 Inst. 713.

Or, in an improper place ; as, plate in a scrivener's shop. 2 Inst. 713. R. 5 Co. 83. b.

If the contract was commenced out of the market. 2 Inst. 713.

Or, made in the night before the rising, or after the setting of the sun. 2 Inst. 714.

176.—8. The criterion to determine whether there has been a delivery on a sale, is to consider whether the vendor still retains, in that character, a right over the property. 2 H. B. 316.—9. Where to a transfer of property a delivery is essential, the commodity must be in a deliverable state, or a symbolical delivery will be ineffectual. 2 M. & S. 397.—10. Where a part of the goods sold by an entire contract, has been taken possession of by the vendee, that shall be deemed a taking possession of the whole. 2 H. B. 504. 1 N. R. 69.—11. The delivery of a part of an entire quantity of goods contracted for, is not a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole, where some act other than payment of the price is necessary to be performed in order to vest the property. 6 East, 614. 2 Smith, 670.—12. Where goods are sent to order by a carrier, the carrier receives them as the vendee's agent. Cowp. 294. Even though not named by him, and so the property is vested in the vendee, on delivery to the carrier. 3 B. & P. 582.—13. A delivery to a wharfinger, to be shipped in due course to order, charges the vendee. And if the vendor writes, upon the wharfinger's assertion, that the goods will go by a particular vessel ; on non-arrival thereby, the vendee is bound to apprise the vendor, at the risk of the consequences. 2 N. R. 119.—14. A. consigns goods to B. abroad, and orders a cargo in return, for which he sends his own ship ; the return cargo is delivered to A.'s captain, B. stating it to be on A.'s account as A.'s own goods, and to be delivered to A. The return cargo, consisting of more goods than the proceeds of those consigned to B., B. draws bills on A. for the difference, which he sends to his agent with a bill of lading drawn in blank, and desiring the agent, in case of A.'s refusal to accept the bills, to indorse the bill of lading to C. A. refuses to accept the bills, and the bill of lading is accordingly indorsed to C. The ship arrives, and C. demands the goods as indorsee of the bill of lading ; the captain, however, refuses, and delivers them to A., who deposits them with D. as his warehouse-man. D. then receives notice from B. to hold the goods for B. as his property ; held, that though the goods might have been delivered to the captain, on condition of A.'s accepting the bills, yet, that as no such condition was imposed at the time of delivery, that delivery was complete, and vested the property absolutely in A. 1 Mars. 323. 5 Taunt. 759.

(o) If A. a merchant abroad, sends goods to B. a merchant in London for B.'s use, and draws on him ; if B. receives the goods, notwithstanding he does not pay the bills but dies insolvent, A. has no lien on the goods. 3 P. Wms. 185.

(p) Where nothing remains to be performed by the vendor, the circumstance of the goods remaining in his possession by election of the vendee, will not prevent the property vesting. 11 East, 210.

(q) Sale of goods in a shop, though not in London, where there is not suspicion of fraud in the buyer, shall change the property. B. R. II. 349.

If the vendee knew the vendor to be an infant, feme covert, &c. who have no authority to sell. 2 Inst. 713. (r)

So it does not extend to a sale to a man of his own goods. 2 Inst. 713. Doct. & Stud. 46. l.

So if A. sell his goods, which are afterwards taken in execution, and sold by the sheriff, and afterwards A. redeems them; he has a new property, which goes to his executor, and not to the vendee. R. 4 Mod. 52. (s)

(r) A. buys plate of B., the defendant, and gives him a draft; for which A. gives a receipt as for cash; A. pawns the plate to C. the plaintiff, who was a pawnbroker, shewing him the receipt as evidence of his title, on which C. took the goods in pawn. The draft turned out afterwards to be a bad one; for A. had no money with the banker. A. was tried on the statute for procuring under false pretences, on an indictment preferred by the defendant B., and was convicted, C. the plaintiff producing the goods. B., the defendant, upon this, took and detained them; A. brought his action of trover thereupon, and held, that he should recover; for that the property was not changed as against the right owner, either at common law, or by the statute of James respecting pawnbrokers. Lofft 187.

(s) 1. *With respect to stoppage in transitu*.—The doctrine of stoppage *in transitu* is founded upon equitable principles only. 2 T. R. 75. 5 T. R. 683. 1 H. B. 357. 2 H. B. 211. — 2. Questions touching the right of stoppage *in transitu* can only arise between vendor and vendee, not between principal and factor; it being a right to revest property, which in the case of a consignment to a factor is never divested out of the principal; the only right given to the factor is a lien upon the property after he has obtained possession. 5 T. R. 783. — 3. A purchaser upon his own credit, by order of another person to whom he consigns, is a vendor entitled to stop *in transitu*. 3 East, 93. — 4. As between the vendor and vendee of goods, the former has a right to stop the goods *in transitu*, if the latter become insolvent before they are delivered. 2 T. R. 63. S. C. 5 T. R. 683. 1 H. B. 357. 2 H. B. 211. 5 T. R. 218. 5 T. R. 367. — 5. Where notes given in payment of goods turn out bad, the goods may be stopped *in transitu*. 7 T. R. 64. — 6. The right of stoppage *in transitu* is not affected by the carrier's right, a lien for his general balance against the consignee. 3 B. & P. 42. — 7. The vendor sent goods to the vendee, and a letter of advice inclosing the invoice was sent to and received by the vendee, and the goods were received by a wharfinger on his account, who debited the vendee for the charges, &c. The vendee suspecting himself to be insolvent, and having committed an act of bankruptcy, refused to receive the goods from the wharfinger, and left them in his hands for the use of the vendor; the vendor demanded the goods from the wharfinger before a commission issued, and the wharfinger promised not to deliver them out of his custody until he was certain of a safe delivery. The stoppage is complete. 2 B. & P. 457. — 8. A. having a quantity of hemp in the hands of B., sells part of it to C., at a certain price, payable by C.'s acceptance at a stated time, fourteen days allowed for delivery, and gives C. an order upon B., to weigh and deliver the hemp so sold to C., or bearer. Before the fourteen days had expired, A. gives B. notice not to deliver the hemp to C. The hemp not having been weighed off, and no bill of exchange having been given in payment for it. Held, that the sale of it to C. was incomplete, and that B. was liable for it in trover by A. 1 Mars. 252. 5 Taunt. 617. — 9. A. delivers goods to a carrier to be conveyed to B. While they are *in transitu*, A. gives notice not to deliver them; but by the mistake of the carrier, they are delivered to B., who disposes of part of them, and soon afterwards becomes bankrupt. Held, that the delivery to B. was incomplete, and therefore that A. was entitled to recover in an action of trover against the assignees. 2 Mars. 457. 7 Taunt. 169. — 10. Where the vendee has no warehouse, or no other place of delivery than the warehouse of the packer, &c. and there is no place of ulterior delivery in view, the transitus will be considered as at an end, when the goods have arrived at such warehouse. 3 B. & P. 119. 5 B. & P. 320. Id. 469. — 11. A. of London, being in danger of insolvency, goes to Glasgow, and obtains goods from B., for which he pays by a bill on a house in London, which he knows to be insolvent. The goods are shipped at Leith, (the invoice and receipt from the ship-owner being made out to A.), and are delivered to C. at a wharfinger's in London, who afterwards receives notice to hold them for B. A. becomes bankrupt. In an action of trover by A. against C., for the benefit of the assignees; held, 1st, that the receipt being made out to A., operated as a delivery to him; and therefore that B.'s right of stoppage *in transitu*

transitu was gone:—2d, That there was not such conclusive evidence of fraud on the part of A. as to avoid the contract. 2 Mars. 366. 7 Taunt. 59. — 12. Goods sent by the vendor to the vendee's agent at X., under an order from the vendee to be so sent, "to be shipped for Y. as usual," (alluding to former transactions) where the vendee's correspondent resided, cannot be stopped after delivery to the agent at X. 5 East, 175. — 13. A delivery on board a chartered, any more than a general ship, does not divest the right to stop *in transitu*. 3 East, 581. 1 East, 515. — 14. By the vendor's assent to a sale by the vendee, and marking the goods by the new purchaser with his own initials, the transit is at an end. 14 East, 508. — 15. The right of stoppage *in transitu* does not proceed on the ground of rescinding the contract; but it is an equitable lien adopted by the law for the purposes of substantial justice. Hence, the circumstance of the vendee having paid in part for the goods, will not defeat the vendor's right of stopping them *in transitu*; the vendor has a right to retake them, unless their full price has been paid; and the only operation of a partial payment is to diminish the lien *pro tanto*. 3 East, 93. — 16. When the master of a ship receives goods on board, and gives a receipt for them, he is not bound to deliver the bill of lading, except to the person who can produce the receipt in exchange for it. Therefore, where A. sells goods to B., to be delivered "free on board," and loads them on board C.'s vessel, taking a receipt, which purports that the goods were received "for and on account of A.," or even without these words; B. sells the goods to D., who, without the consent of A., obtains a bill of lading from C.; B. becomes bankrupt. Held, that A. being in possession of the receipt, is entitled to stop the goods *in transitu*. 2 Mars. 127. 6 Taunt. 435. Loft. 325. — 17. The assignment by the consignee of a bill of lading, *bona fide* and for valuable consideration, whether by a full or blank indorsement and delivery, transfers the property in its contents to the assignee; so that the consignor cannot, on the insolvency of the consignee, stop *in transitu*. 2 T. R. 65. S. C. 5 T. R. 683. 1 H. B. 357. 2 H. B. 211. — 18. If a bill of lading is transferred by the consignee for a consideration short of the price of its contents, but without notice that the contents have not been paid for, and the indorsee afterwards, with notice of that fact, agrees that himself and the consignee shall be partners in the contents, his original right is thereby compromised, and he must stand upon his new one only; and since that is no better than the consignee's, the consignor, on insolvency of the latter, may stop *in transitu*. 2 T. R. 674. — 19. Bankruptcy in the vendee, any more than insolvency, is not in itself a countermand of delivery. If, therefore, the goods reach the possession of the assignee under the commission (in whom by the assignment the property is vested) before they are stopped, the right of stoppage to the vendor is at an end; as if he puts his mark upon them, since then the carrier becomes his agent in charge. 5 T. R. 464. — 20. Where, on a sale of goods, they are delivered by agreement between the vendor and purchaser to a third person, for work to be done to them, who is to return them to the vendor, by whom he is to be paid; the goods, whilst in his hands, are *in transitu*, and therefore, all other essentials concurring, may be stopped by the vendor. 7 T. R. 64. — 21. *In regard to the rescission of the contract.*—Where by the terms of a contract of sale, the vendee may rescind it, without any acceptance or other act on the vendor's part, by returning the thing sold, the contract is rescinded, though the vendor refuse to receive it. 1 T. R. 153. — 22. The concurrence of both vendor and vendee is necessary to rescind a contract of sale; so that if an offer to rescind is made by one and rejected by the other, the latter cannot afterwards, and after the rights of third persons have intervened, by assenting rescind it; as where the former becomes bankrupt in the interim. 5 T. R. 402. — 23. Where there is an agreement to take a horse back, if on trial he shall be found faulty, though it is accompanied with an express warranty, yet it is incumbent on the purchaser, if he discovers any fault, to use due diligence in returning the horse, for a trial means a reasonable trial. 2 H. B. 573. — 24. Where a horse is sold with a month's trial, the vendee may rescind the contract at the end of the month, though in the interim he was desired by the vendor to return him, on his saying that he disliked the price. 1 N. R. 257. — 25. If the vendor of goods accepts an offer previously made by the purchaser to return them, the contract is thereby rescinded, and the property revested from the time of the offer, so as to avoid an attachment in the interim by the creditors of the purchaser. 5 T. R. 211. — 26. If a contract of sale is concluded, and the purchaser, on the commodity being tendered, refuses to receive it, whereupon the seller requests him to sell it for him, which he agrees to do, this amounts to a waiver of the original contract. 3 M. & S. 378. — 27. Where one party derives benefit from a thing, the title to which eventually proves defective, he cannot recover the consideration paid to the other, if ignorant of his want of title. 1 N. R. 260. — 28. As against the vendee the contract of sale is annulled, by a material alteration in the sale note, made by the broker at his instance, after delivery.

(E) *When the property is not vested.*

But, if a man take the goods of another by wrong, that does not alter the property. (t)

As, if thieves steal goods, the property is not vested in them.

So if pirates take goods. Grot. de j. b. et p. l. 3. c. 9. s. 16. R. 1 Rol. 285.

And though the king grant *bona piratarum* to the admiral, and goods taken *piraticè* are brought to England, the owner may take them; for the grant extends only to the proper goods of the pirates. R. 1 Rol. 285. 3 Bul. 28. 148. Vide Admiralty, (D—E 3.)

So if a pirate sell goods, taken *piraticè*, to A., the owner may take them. 3 Bul. 29.

delivery. 15 East, 29. — 29. If A. transfers goods to B. for a particular purpose, which it afterwards becomes unnecessary or impossible to fulfil, the property is re-vested in A. 5 T. R. 215. 2 II. B. 501. — 30. *With respect to payment*—If goods are sold, to be paid for in ready money, the vendor should not deliver them without payment. If he does, he consents to waive the mode of payment stipulated for, and lets in any other which by law is accounted such; for instance, a set-off. 2 M. & S. 510. — 31. If goods sold are to be paid for by a good bill, and the bill given proves bad, the vendor may sue the vendee for the price. 6 T. R. 142. and see Bill of exchange. — 32. *As to who shall be considered the vendor*.—Goods belonging partly to A. and partly to B., are put to auction at A.'s house, having been entered at the excise in A.'s name, and the catalogue stating them to be all the property of A. C. being the holder of an acceptance of A., purchases several of the articles, without being informed that part of them only were the property of A., and settles with A. for the amount. Held, that the payment to A. was good, and that the auctioneer having suffered C. to take away the goods without giving him notice not to pay to A., was precluded from recovering from C. the value either of the goods which had been the property of A., or of those which had been the property of B. 2 Mars. 497. 7 Taunt. 237. So, though there had been no actual settlement, the purchaser would have been entitled to have set off a debt due to him from A. 2 Mars. 501. 7 Taunt. 243. — 33. *With reference to the vendee*.—The person who had the benefit of goods sold to a third person, held liable, under circumstances, to the vendor for the price. 4 Taunt. 576. — 34. The vendor of goods sold and delivered to A. and transferred to B., by consent may sue B. for the price. 5 Taunt. 450. — 35. There is an agreement between A. & B., traders, A. on his separate account in England, A. and B. on their joint account in Ireland, that goods ordered by A. to be purchased by B. for the house of A. & B. shall be charged at prime cost. Held, that B. as well as A. was liable to the seller for goods so purchased, and that the debt arose in England. 1 Taunt. 270. — 35. *In regard to actions between vendor and vendee*.—Quære, whether the onus of proving the dishonour of a bill given in payment is thrown on the buyer or seller in an action for goods sold? 7 Taunt. 312. 1 Moore, 61. — 36. Demand of delivery of goods sold, as sufficient proof of an averment that plaintiff was ready and willing to perform his part of the contract, although that demand was made by his servant, when he himself was not present to have done so, if required, on the spot. 3 Price, 86. — 37. *As to the vendor's duty to insure, pursuant to a carrier's notice*.—Where goods are sent to order by a carrier, and lost, the vendee cannot be charged, where the vendor neglected to insure pursuant to the carrier's notice, which was notorious. 14 East, 475. — 38. *As to whether a sale shall be invalidated by the want of a revenue licence in the vendor*.—Where no fraud upon the revenue is intended, but there is a neglect only by the vendor to take out a licence or enter himself as a dealer, the contract of sale is valid. 11 East, 180.

(t) 1. Where the lawful property may be identified and traced out, the owner shall come and recover, when the thing has been unlawfully converted and changed; for though the possession has been changed, the property has not; nor will seizure into the hands of the crown in such case be a bar. Loft. 759. — 2. Trover lies where a felon has stolen goods and changed them into notes, if the notes clearly appear to be the product of the specific goods. Loft. 89.

So, though the wrong-doer sell the goods to the owner himself.
Doct. & Stud. 90.

Or die in possession; for a descent does not toll a right to goods.
Co. L. 249. a.

(F) What things are nullius in bonis.

Feræ naturæ.

In things which are *feræ naturæ*, none can have an absolute property:

As, in deer, conies. R. 7 Co. 17. b.

Nor, in hawks, doves, herons, pheasants, partridges, or other fowl, which are at large, and not reclaimed. 10 H. 7. 6. 30.

Nor, in fish (*u*) at large in the water.

Nor, in swans not marked, and at large. 7 Co. 16.

But all swans are royal fowls, and may be seized to the use of the king. 7 Co. 16. a.

Yet, a man may have a qualified or possessory property in the same as if deer, &c. are tame. 7 Co. 17. b.

If hawks, &c. are reclaimed.

So if pheasants, partridges, or other fowls are tame.

If a swan be tame, viz. kept in his private moat, or pond, though it be not marked. 7 Co. 16. b.

Or if it be kept in waters within his manor. 7 Co. 16. b.

So if it be lawfully marked, though it be at large. 7 Co. 17. a.

So a man may prescribe for a game of wild swans, not marked, in such a creek. R. 7 Co. 18. a.

So doves in a dovecote.

Young herons, &c. in their nests. 7 Co. 17. b.

Fish in a trunk, &c.

And of such things tame, or inclosed, felony may be committed. 7 Co. 18. a.

Or trespass lies, *quare damas, accipitres, &c. suos cepit*, if he shews them to be reclaimed. 7 Co. 17. b. Vide in Pleader, (3 M 9.)

But, if deer, fowls, &c. tame, or reclaimed, attain their natural liberty (*x*), and have no inclination to return, the property shall be lost. 7 Co. 17. b.

So if the possession be *ratione privilegii* only, he has no property in them; as, if deer are in a park, conies in a warren, &c. 7 Co. 17. b.

And, if they go out of the forest, park, &c. the forester cannot enter another's soil to retake them. Kel. 30. Manw. 106.

So a man may have a property in a dog. 7 Co. 18. a. R. 12 H. 8. 4. 5.

And there are four dogs, of which the law takes notice, viz. a mastiff, an hound, (which comprehends greyhound, bloodhound, &c.) a spaniel, and a tumbler. 7 Co. 18. a. D. Cro. El. 125.

And trover, or trespass lies for them. R. 1 Rol. 5. l. 30. Ow. 94. Hob. 283. Cont. 3 Leo. 219. Adm. 2 Cro. 44. 469.

(*u*) Unless where an exclusive right is vested in a particular person, fish upon the sea-shore, between high and low water-mark, belong to the first fortunate finder. 2 B. & P. 472.

(*x*) If A. start a hare in the grounds of B., hunt it into those of C., and there take it, the property therein is in A. 14 East. 219.

And a defendant may justify an assault in the defence of his dog. D. Cro. El. 125. Ow. 94. Vide in Pleader, (3 M 15.)

And delivery of a dog will be a good consideration for an *assumpsit*. R. Cro. El. 125. Ow. 93.

So a man may have a property in monkeys, parrots, &c. for they are merchandize, and valuable.

(G) Emblements.

(G 1.) What are.

Emblements upon the land at the death of the tenant, are chattels, and go to the executor or administrator. Vide ante, (A 2.)

And therefore, if a man sow his land, and die; the corn growing goes to his executor, or administrator. Co. L. 55. b.

So, if he set roots. Co. L. 55. b.

If he plant hops from old roots; for he annually manures the land, &c. R. Cro. Car. 515.

If he sow hemp, flax, or other thing of an annual profit. Co. L. 55. b. 1 Rol. 728. l. 1.

But things, which give no annual profit, are not comprehended under emblements: as, if he sow the land with acorns. Co. L. 55. b. 1 Rol. 728. l. 5.

Or plant oak, elm, ash, or other trees. Co. L. 55. b.

So things, which proceed annually of themselves, without the labour of men, are not emblements; as, grass.

Though improved by the labour or industry of the lessee. 1 Rol. 728. l. 10.

(G 2.) Who shall have them.

If tenant in fee, or in tail, die after sowing of the corn, and before severance, his executor, or administrator, generally, shall have the emblements. 10 Ed. 4. 1. b. 21 H. 6. 30. a. 37 H. 6. 35. b. (y).

So, by the St. Mert. 20 H. 3. 2. Tenant in Dower.

So every one, who has an uncertain estate or interest, if his estate determines by the act of God before severance of the corn, shall have the emblements, or they go to his executor, or administrator: as, if tenant for life sow the land, and die before severance. Co. L. 55. B.

Or, tenant *pur auter vie* and *cestuy que vie* dies. Co. L. 55. b.

(y) 1. But if tenant in fee devises his estate, the devisee shall have the crop whether the devise was before the sowing. Winch. 52. Vide Co. Litt. 556. n. 8 East, 343. — 2. Or after. Winch. 51. — 3. If he devises it to one for life, with remainder over, and the devisee for life also dies before the severance, the remainderman shall have it. Winch. 51. Cro. Eliz. 61. — 4. If a man conveys an estate which he has sown to A. for life, and A. dies before the crop is severed, the person who sowed it shall have it. Hob. 132. in marg. — 5. Though the devisee is *primâ facie* to have the crops, he shall not, if there are words to show an intent that the executor shall have them. 8 East, 343. — 6. A devise to the executor of all the stock upon his farm will entitle the executor to the crops. 8 East, 339. — 7. Where testator devised his lands in fee, and gave to his executors all his monies, &c. household goods, stock upon his farm, with the implements of husbandry, and all other his personal estate, of what nature or kind soever; the devisee sold the crops which were standing when the testator died, and the executors brought money had and received. Le Blanc, J. thought at the trial, that the devisee was entitled, but reserved the point; and the court considered the point settled by Cox v. Godsalve, and gave judgment for plaintiff. 8 East, 359.

Or,

Or, tenant for years, if he so long live; or the lessee of tenant for life. Co. L. 55. b. 1 Rol. 727. l. 11. 15.

Or, if a lessee at will die. Co. L. 55. b.

So if a tenant by statute-merchant, &c. sow, and be satisfied by the casual profit before severance. Co. L. 55. b.

So, if a joint tenant agree, that his companion shall occupy, and sow all the land, who sows, and dies before severance, his executor shall have them. R. Ow. 102.

So, if his estate determines by the act of another: as, if lessee at will sow the land, and before severance the lessor determines his will, Lit. sect. 68.

So, if a man seized in right of his wife sow, and die before severance, his executor shall have the emblements. Co. L. 55. b.

So, if the wife die before severance, the husband shall have them. Co. L. 55. b.

So, if a man die, his wife *privement ensuint*, and the daughter enter and sow, and then a son is born; the daughter shall have them. Co. L. 55. b. 1 Rol. 727. l. 20.

The st. of Mert. 20 H. 3. 2. which gives the emblements to tenant in dower, was only in affirmance of the common law. 2 Inst. 81. T. 4. H. Fitz. Devise, 26.

But by some, it was by the equity of the st. of Mert. that tenant in fee, in tail, by the curtesy, for life, at will, or the like uncertain interest, shall be allowed emblements. Per Prisot, 37 H. 6. 7. a. Per Fortescue & Danby, 37 H. 6. 35. b. Per Yel. but two J. cont. 21 H. 6. 30. a. 10 E. 4. 1. b.

But where a man has a certain interest, and knows the determination of his interest, he shall not have the emblements at the end of his term: as, if lessee for years sow his land, and before the corn severed, his term ends; the lessor, or he in reversion, shall have the corn. Lit. sect. 68.

So, if husband and wife are joint-tenants for life, and the husband sows, and dies before severance, the wife surviving shall have it, and not the executor of the husband. Co. L. 55. b. Semb. 8. Ass. 21. Per five J. 4 cont. Dy. 316. a. and there, by an award, the wife had three parts, and the executor the fourth for his seed. Per Wray, said to be adjudged, but Poph. dub. Cro. El. 61. Dub. Noy, 149. Dy. 316. in marg. Vide 1 Rol. 727. l. 30. Dub. and the wife had one moiety, and the executor the other moiety. 2 Ver. 322.

So, where one joint-tenant sows, and dies, the survivor shall have it. Per Poph. Ow. 102. Acc. 2 Ver. 323.

So, if a man devise land to A. he shall have the emblements. R. per three J. Win. 51.

So, if a devise be to A. for life, remainder to B., and before severance A. dies; B. shall have them. Per two J. Clench cont. Cro. El. 61. Said to be adjudged, Win. 51. Godb. 159.

So, if a devise be to A. for life, who dies before severance, he in the reversion shall have them. Per two J. Clench cont. Cro. El. 61.

So, though the devise was made before sowing, and the deviser afterwards sow, and die before severance, the devisee shall have them, and not the executor. Said to be adjudged, Win. 52.

So, if a man determines his estate by his own act, he shall not have the

the emblements; for they go with the land: as, if lessee at will sow, and afterwards determine his will before severance. Co. L. 55. b. 5 Co. 116. Cro. El. 461.

If a lessee *durante viduitate* sow, and afterwards take husband. Co. L. 55. b. R. 5. Co. 116. Cro. El. 460.

If a lessee surrender. 1 Rol. 726. l. 40.

So, if the estate determines by forfeiture, condition broken, &c. for it is the act of the lessee. Co. L. 55. b. 1 Rol. 726. l. 33. 36.

As, if the lord enter upon a copyholder for not doing of services; he shall have the emblements *tempore seisinæ*. Bro. Emblements 4. 4 Co. 21. b.

So, if a man enter by title paramount, he shall have the emblements: as, if a disseisor sow, and the disseisee enter before severance. Co. L. 55. b. R. Mo. 24. Bro. Emblements 10. 12. 17. 20.

So, if the disseisee enter after the corn severed by the disseisor. R. Dy. 31. b. Dal. 30. Co. L. 55. b. R. Mo. 24.

So, if A. acknowledge a statute, or recognizance, and afterwards sow the land, and the conuzee extend the land. R. 2 Leo. 54.

But, if the lessee of tenant for life be disseised, and the lessee of the disseisor sow, and then the tenant for life dies, and he in the remainder enters; he shall not have the corn, but the lessee of the tenant for life. R. 5 Co. 85. a. Cro. El. 463. (z)

(H) Trees.

All trees annexed to the land are parcel of the inheritance, and pass with it.

And therefore, if a man convey land by bargain and sale, grant, &c. and all trees, by express words; if the land does not pass for default of enrolment, or otherwise, the trees do not pass. R. 11 Co. 48. a.

So, if a man lease lands for life, or years, with all trees, &c. the trees pass only as they are annexed to the land, and the lessee shall be subject to waste, if he cuts them down. R. 11 Co. 48. a. 2 Bul. 7.

So, if a man lease lands for life, or years, except the trees; yet those continue parcel of the inheritance, (so long as they are annexed to the land,) and descend with it to the heir. R. 11 Co. 48. a.

Or, if the lessor convey the inheritance, they pass with it to the grantee. R. 11 Co. 48. a.

If a feoffment be, except the trees, and the feoffee afterwards buy the trees, they are re-annexed, and parcel of the inheritance. 11 Co. 50. a. 4 Co. 63. b.

(z) 1. But the tenant for life's lessee shall have it; for had the tenant for life lived until the severance, and the lessee had entered at any time before, he would have become entitled to it, and when the act of God deprives him of the power of entering, the law gives him whatever an entry would have entitled him to. Cro. Eliz. 464. 5 Rep. 85. — 2. If a man conveys an estate, which he has sown, to A. for life, remainder to B. for life, and A. dies before the crop is severed, B. shall have it. Hob. 132. Godb. 159. — 3. If the mortgagor sows the land, and the mortgagee enters, the mortgagor will not be entitled to the emblements. Dougl. 283. — 4. A. lets land to B. for 99 years determinable on his life, with proviso for re-entry, if let to tillage without licence. C. under-tenant plows and sows in the life-time of B., who dies, no re-entry being made; the proviso is gone on the determination of the lease; A. cannot have any advantage of it; and C. may enter the lands, and take the emblements. 3 Wils. 127.

If tenant in tail grant his trees, and die before severance, they are afterwards re-annexed to the inheritance. 11 Co. 50. a.

If A. tenant for life, without impeachment of waste, with power to cut trees, &c. and to make leases for three lives, lease for three lives, except the trees, and die before cutting; the trees are re-annexed, and his executor cannot cut them. R. Lat. 163.

But, if the owner of the soil grant all his trees, they are now severed from the inheritance.

And though the soil itself does not pass, yet a sufficient nutriment out of the earth for the vegetation of the trees, is granted. R. 11 Co. 49. b.

And, if there be a grant to any one and his heirs, he has an inheritance in the trees without livery. 11 Co. 49. b.

If tenant in tail grant trees, they go to the grantee and his executors, 11 Co. 50. a.

But, if the tenant in tail die before severance, the grantee cannot afterwards take them. 11 Co. 50. a.

If tenant in fee lease, excepting the trees, and afterwards grant the trees to the lessee; they are not re-annexed to the inheritance, but the lessee has an absolute property in them. R. 4 Co. 63. b.

If he lease, excepting trees; he has power to shew them to a buyer, to cut and carry away. R. 11 Co. 52. a.

If he excepts trees, but only the loppings to his wife; the wife shall have the loppings of all the trees there. R. Jon. 376.

Lessee for life, or years, has only a special interest and property in the fruit and shade of timber trees, so long as they are annexed to the land. 4 Co. 62. b. Dy. 90. b. 1 Rol. 181.

And he has a general property in hedges, bushes, trees, &c. which are not timber. 4 Co. 62. 1 Rol. 181.

And, therefore, if the lessee cuts down (a) hedges or trees not timber, the lessee shall have them.

So, if dotards, &c. which have no timber in them, are thrown down by the wind, &c. the lessee shall have them. Mo. 812.

So, if a man cut down timber trees, the lessee shall have trespass, in respect to the loss of his fruit and shade.

Though the lessor, or any one by his licence or command, cut them 11 Co. 48. b. Mo. 7. Jon. 376.

So, if a house be thrown down by tempest, the lessee may take timber for repairs. 1 Rol. 181.

So the lessee may cut down trees for repairs. Vide in Pleader, (3 O 11.) — Waste, (D 5.)

Though he be restrained to take them without assignment; if there be no assignment upon request. Lut. 1480.

But the lessee cannot assign his term, excepting the trees; for he has an interest only in respect of the land, (unless it be, without impeachment of waste.) R. Al. 81, 82. Adm. Lat. 269.

(a) 1. The property in trees severed for an unjustifiable purpose, immediately vests in the general owner. 2 M. & S. 494. — 2. Thus a tenant for life dispunishable. 1 T. R. 55. — 3. Or where there is none such, then to him who has the first estate of inheritance. 3 P. Wms. 276. Al. 81. 3 Atk. 751. 1 Ves. 524. 546. — 4. But in the case of an entry to avoid a fine, the entry has no relation with respect to trees felled. 18 East, 474. — 5. By severance the special ownership in trees is determined. 1 N. R. 25.

And if the lessor except the trees, the lessee cannot take them for repairs.

Though he be allowed to take them by assignment for repairs; yet if the lessor does not assign, the lessee cannot take them, and if he does take them, he will be a trespasser. R. Lut. 1480.

So tenant after possibility cannot grant his estate, except the trees, Per Jones, Lat. 270.

But the general property of timber trees remains in the lessor, who has the inheritance of the land. 11 Co. 48.

And, therefore, if he grants the trees during the lease, the grant is good, though it shall not take effect until the lease be determined, without the assent of the lessee. 11 Co. 48. b. Cont. 4 Co. 62. b.

And, if the lessee cut down trees, or pull down a house, the lessor may take the timber which the lessee does not use for repairs; for when it is severed from the land, the general property is in the lessor. R. 11 Co. 81. b. R. 4 Co. 62. b. 63. a.

So, if the trees or house be thrown down by tempest, the lessor may take them, or maintain trover for them. R. 11 Co. 81. b. R. 4 Co. 63. b.

So, if they are cut down by a stranger, or otherwise severed from the land. 11 Co. 81. b. R. per three J. Cro. Car. 242. Jon. 255.

If he in reversion cut and sell with the assent of the tenant for life, being a recusant, he shall have the money, not the king. R. 1 Bul. 133.

So, if a disseisor cut down trees, &c. the disseisee, after re-entry, shall have trespass; for he revests the freehold in himself *ab initio*. 11 Co. 51. a.

And though he shall not have trespass against the feoffee or lessee of the disseisor, who come in by title, or against a second disseisor; yet, if such feoffee, lessee, or second disseisor cut down trees, &c. the disseisee after his re-entry, shall have trover; for the property is re-continued to him. 11 Co. 51. b.

Though the feoffee, lessee, &c. had sold or carried them off from the land; for that does not alter the property. 11 Co. 51. b.

So, if tenant by the curtesy, or in dower, cut down trees, &c. he in reversion or remainder may take them, or maintain trover for them, 4 Co. 63. a. 11 Co. 82. a.

So, if tenant after possibility, &c. 4 Co. 63. a. R. cont. 1 Rol. 184.

So, if tenant for life, remainder for life, cut down trees, &c. he in the reversion shall take them, or shall have trover for the trees, though he cannot have waste during the same remainder. R. Al. 81.

So the lessor may take or maintain trover for the bark of the trees cut. R. Cro. Car. 242. Jon. 255.

Though the trees are converted to boards, &c., for the principal substance remains. R. Mo. 19, 20.

Though they are carried away, or converted at the time of cutting, or afterwards. R. Al. 82.

Though the lessor does not seize the trees before the action commenced, R. Al. 82.

Yet, if there be a lessee for life or years, without impleachment of waste, he has an interest and property in timber trees, &c. and may cut

cut them down, and convert them to his own use. Co. L. 220. a. R. Mo. 327. R. 11 Co. 82. b.

So, if trees are thrown down, or the house prostrated by tempest, the lessee without impeachment of waste may take them; for the entire property is in him, when the trees are severed from the inheritance by the act of the party or of the law. R. 11 Co. 84. a. 1 Rol. 183, 4.

And, if the lessor afterwards sell the trees, and the lessee without impeachment cut them down, the vendee cannot have trover for them; for the sale was void against the lessee. Semb. Cro. Car. 274.

So, if a stranger cut down the trees, the lessee without impeachment may have them, or maintain trespass or trover for them. Cont. 4 Co. 63. a. Acc. 1 Rol. 183.

So lessee without impeachment may assign his term, excepting the trees. R. Al. 82. Lat. 270.

So he may make a lease except the trees. Vide Lat. 270.

So may tenant after possibility. Semb. Lat. 270.

But a lessee without impeachment has not an absolute property in the trees; for, if he does not cut them down during his term, he shall not have them, but the lessor shall have them, as annexed to the freehold, 1 Rol. 182. Lat. 270.

Bona confiscata, etc. Vide WAIFE, (D).

— *felonum*. Vide WAIFE, (C).

— *fugitivorum, et in exigend' positorum*. Vide WAIFE, (B).

— *notabilia*. Vide ADMINISTRATOR, (B 4.)

BIGAMY.

Vide POLIGAMY, in JUSTICES, (S 5.)

BILL.

Bill of appeal. Vide APPEAL, (G 4.)

— *by way of appeal*. Vide CHANCERY, (2 O 2.)

Tertiorari Bill. Vide CHANCERY, (2 O 1.)

Bill in chancery. Vide CHANCERY, (E 1, 2. — F. — G. — M. — Y 6. — 2 N 1, &c.)

— *of credit*. Vide MERCHANT, (F 3.)

— *for discovery*. Vide CHANCERY, (2 G 3. — 3 B 1, 2.)

— *in equity for tithes*. Vide CHANCERY, (3 C.) — DISMES, (M 14.)

— *when evidence*. Vide EVIDENCE, (C 2.)

— *of exceptions*. (b)

(b) 1. The court out of which a record issues cannot take cognizance of a bill of exceptions tendered at the trial. Cowp. 501. — 2. The court of K. B. after deciding on a bill of exceptions, that evidence rejected in the court of great sessions in Wales was admissible, will award a *venire de novo* into the next English county. 2 T. R. 125. — 3. Where judgment for the plaintiff in C. B. is reversed, on a bill of exceptions in K. B. the defendant is not entitled to costs. 5 East, 49. — 4. Nor can the costs of a bill of exceptions be included in the taxation below. 1 B. & P. 32.

BREACH.

- Bill of exchange. Vide ACTION UPON THE CASE UPON ASSUMPSIT, (A 2.) — MERCHANT, (F 4, &c.)
- of obligatory. Vide MERCHANT, (F 2.) — OBLIGATION, (D).
- Original Bill. Vide CHANCERY, (Y 6. — 2 N 1, &c.)
- Bill in parliament. Vide PARLIAMENT, (G 11, &c.)
- of rebieto. Vide CHANCERY, (G).
- of rebitor. Vide CHANCERY, (F).
- Single Bill. Vide OBLIGATION, (C).

BISHOP.

- Vide CERTIFICATE, (A 1, &c.) — ECCLESIASTICAL PERSONS, (C 2.)
- ESGLISE, (H 11.) — IRELAND, (E.) — PLEADER, (3 I 12.) — VISITOR, (A 8.)

BODY POLITICK.

- Vide CAPACITY, (A 2. — B 5.) — FRANCHISES, (F 1, &c.)

BONA NOTABILIA.

- Vide ADMINISTRATOR, (B 4.)

BOND.

- Vide CHANCERY, (4 D 1, &c.) — CONDITION, (A 5. — D 7, 8.) — OBLIGATION. — PLEADER, (2 G 12. — 2 W 9. 16, &c. 46.)

BOTTOMREE.

- Vide MERCHANT, (E 4.)

BREACH.

- Breach of an award. Vide ARBITRAMENT, (G. — H. — I 5, 6.)
- of a condition. Vide CONDITION, (M 1, &c. — N. — O 1, &c. — S 1, 2.) — CHANCERY, (2 Q 2, &c.)
- of covenant. Vide COVENANT, (E 1, &c. — PLEADER, (2 V 14, &c.)
- of faith. Vide PROHIBITION, (G 13.)
- of the peace. Vide JUSTICES OF THE PEACE, (B 4, &c.) — LEET, (L 5.)
- of prison. Vide ESCAPE. — IMPRISONMENT, (M 3.) — JUSTICES, (Q). — OFFICER, (G 8.) — RESCOURS.

Breach

Breach of recognizance. Vide BAIL, (O — P.)

—— of trust. Vide CHANCERY, (4 W 25, &c.)

Assignment of a breach. Vide PLEADER, (C 44, &c. — F 14, 15.)

BREAD.

Assize and Assay of Bread. Vide JUSTICES OF PEACE, (B 96.) — LEET, (L 8.)

BRIEF.

(A) The several sorts of writs.

Breve, sicut regula juris, breviter rem enarrat, intentionem tamen enarrantis plane exprimit. Co. L. 73. b.

Writs are either original or judicial. Co. L. 73. b.

As to mesne or judicial process. Vide in Process. Vide in Execution.

And process by writ may be upon an indictment or information in criminal cases. 2 Inst. 40.

As well as in actions real, personal, or mixed. 2 Inst. 40.

So some writs are in the nature of a commission.

As a writ of error or false judgment. 2 Inst. 40.

A writ for election of knights of the shire for parliament. 2 Inst. 40.

Or for election of a verderor or coroner. 2 Inst. 40.

Or for his discharge. 2 Inst. 40.

A writ of *justicies*. 2 Inst. 40.

De ventre inspiciendo. 2 Inst. 40.

De viis & venellis mundandis. 2 Inst. 40.

De securitate pacis. 2 Inst. 40.

A writ of association, *si non omnes*, &c. 2 Inst. 40.

So some writs are extra-judicial and mandatory; as, a writ for summoning a peer to parliament. 2 Inst. 40.

Or for summoning one to be chief justice of B. R. 2 Inst. 40.

Or for taking the degree of a serjeant at law. 2 Inst. 40.

A *conge d'elire* a bishop. 2 Inst. 40.

A writ *de restitutione spiritualium*. 2 Inst. 40.

A writ of livery. 2 Inst. 40.

A writ of protection. 2 Inst. 40.

So, writs in the negative; as, *de non ponendis in assisis & juratis*. 2 Inst. 40.

Quod ne exeat regnum. 2 Inst. 40.

In all actions the king's writ shall be allowed *ex debito justitiæ*. 2 Inst. 40.

And, as it was established by parliament originally, it cannot be changed without authority of parliament. 2 Inst. 40.

All writs ought to issue under the great seal, and in the king's name. Vide Process, (A 2, 3.)

A writ generally shall be directed to the sheriff or coroner. 2 Inst. 41.

But it may be directed to the party himself. 2 Inst. 41.

For more concerning the various sorts of writs, vide their respective titles.

BRIBERY.

BRIBERY.

Vide OFFICER, (I.) — PARLIAMENT, (G 5.)

BRIDGES.

Vide CHIMIN, (B 1, &c.) — USES, (N 4.)

BRINGING MONEY INTO COURT.

Vide PLEADER, (C 10.)

BROKAGE.

Vide CHANCERY, (3 Z 8,) — OFFICER, (A 2.) — USURY, (D),

BROKER.

Vide MERCHANT, (C).

BUGGERY.

Vide JUSTICES, (S 4. — Y 13.)

BURGAGE TENURE.

Vide BURROUGH, (E.)

BURGESS.

Vide BURROUGH, (D.)

BURGLARY.

Vide JUSTICES, (P 2, &c. — Y 7.)

BURIAL.

Vide CEMETERY, (B.)

BURROUGH.

BURROUGH.

(A) Burrough; what shall be. p. 299.

(B) City; what shall be. p. 299.

(C) Citizen. p. 299.

(D) Burgess. p. 300.

(E) Tenure in burgage. p. 300.

(A) Burrough; what shall be.

Burrough imports an antient town of principal note, and which enjoys particular privileges. Lit. s. 164. Co. L. 109. Brady's Treat. of Burroughs, 2, 3.

Every city is a burrough, but every burrough is not a city. Co. L. 109.

Every burrough sends burgesses to parliament; and, therefore, no town shall now be called a burrough, which does not send burgesses to parliament. Lit. s. 164. Co. L. 108, 9. The writ of summons commands, *quod de quolibet burgo duos burgenses eligi facias, &c.* and the antient return was, *non sunt alii burgi, &c.* — But Brady says, that towns in antient demesne which sent burgesses to parliament, were yet not burroughs. Brady's Treat. of Burroughs, 36.

So, *burgus* is used *promiscuè*.

A burrough might be within a seigniori of the king, or of another lord spiritual or temporal. Lit. s. 162, 3.

Some burroughs are incorporate, and some not incorporate. Co. L. 108. b. Hob. 15. But Coke says, that it was there resolved, that burroughs cannot take privilege, unless they are incorporated. 12 Co. 121.

(B) City; what shall be.

A city is a burrough incorporate, in which there is or was a bishop within time of memory. Co. L. 109. b.

Yet Westminster is a city, though not incorporated.

So Cambridge, Leicester, &c. were antiently called cities, though there never was any bishop there. Co. L. 109. b. Brady's Pref. to the Treat. of Burroughs.

And a city was promiscuously called villa or villata, Mad. Firm. Burgi, 2.

(C) Citizen.

As to the election of citizens to parliament, vide in Parliament, (D 6, &c.)

(D Burgess.

(D) Burgess.

As to burgesses elected to parliament, and the manner of the election, vide in Parliament, (D 7, &c.)

How one shall be elected a burgess, and what he must do after his election, and how disfranchised. Vide in Franchises, (F 20, &c.)

(E) Tenure in burgage.

In antient burroughs, all having tenements there, usually held of the king by rent, which is a socage tenure, though called tenure in burgage. Lit. sect. 162.

Burrough court. Vide COURTS, (P 1, &c.)

BURROUGH ENGLISH.

(A) Burrough English.

Vide GAVELKIND, (A.) COPYHOLD, (K 4.)

By the custom in some burroughs, the youngest son shall inherit (c) all the tenements within the same burrough, as heir to his father; and this is called burrough English. Lit. s. 165.

And this custom is very reasonable; for the youngest is least able to help himself. Lit. s. 211.

And it shall be in the same manner in copyholds as in freehold. R. Cro. Car. 411.

And where the custom extends to land, it shall extend to a rent issuing out of the land. 1 Sal. 244. R. 2 Lev. 87.

If such land be demised to A. and his heirs *pur auter vie*, it shall go to the youngest son. 2 Ver. 226.

So, by custom, the youngest brother shall inherit. Co. L. 140. b. 110. b.

Or the youngest daughter shall inherit alone. Co. L. 140. b.

So, the youngest son, if he be not of the half blood. Co. L. 140. b.

So, by custom, the eldest daughter alone may inherit. Co. L. 140. b. Cro. Car. 484.

But these customs shall be taken strictly; and, therefore, the custom of burrough English does not extend to the youngest brother, without a special custom. 2 Cro. 198. Cro. Car. 411. 1 Rol. 623. l. 42.

Nor a custom for the youngest brother, daughter, sister, &c. extend to an aunt, &c. 1 Rol. 623. l. 40. 4 Leo. 242. Godb. 166.

Or a niece. 4 Leo. 242.

(c) 1. Burrough English lands descend in the same way and under the same restrictions, in and under which other lands descend, except that the person to whom they descend is altered by the custom. *Ld. Rd.* 1024. — 2. Therefore where the issue of an eldest son would take by descent at common law, *jure representationis*, the issue of the youngest will take by the custom. *Ibid.* — 3. So a right of entry into such lands will descend as would the land. *Ibid.* — 4. A settlement was made before marriage of a freehold estate to the husband and wife for life, and after their decease, to the heirs of the husband on the wife; and of copyhold in Borough English, to the husband and wife for life, and after their decease, to the heirs of their two bodies, in like manner and to the same uses as the freehold. Held, that the youngest son shall succeed as heir in tail to the copyhold. 2 Blk. 1228.

So, if there be a custom, that a descent shall be to the youngest son, and he dies in the life of his father; the descent shall not go to his issue, without a special custom. Court divided Jon. 362. R. cont. 1 Sal. 243. Mod. Ca. 120. (d) Vide infra.

So, if the father die, and afterwards the youngest son dies without issue before entry; it shall not descend to his youngest, but to his eldest brother. Dub. Jon. 362. But it would have been clear, if the youngest son had entered. Ibid.

So, if the father die, and the youngest son enter, and afterwards a younger son is born, he shall not enter; for the custom shall take effect in him who was youngest at the death of the father. Dub. Jon. 362. Cro. Car. 412. Inclined cont. Sal. 244.

So, if A. be tenant for life, the reversion to B. who has three sons, and dies, and the youngest son dies in the life of A. the descent shall be to the eldest brother, and not to the middle. Dub. Jon. 362. Cro. Car. 412. Semb. cont. 1 Sal. 243, 4. Mod. Ca. 120. Vide infra.

Lands of the nature of burrough English, in other respects usually pursue the course of the common law; and therefore, a tenant of such land shall have error, attain, &c. Jon. 361.

Shall have a formedon for the lands in tail. Jon. 361.

Shall be vouched; charged for the debt of his ancestor, &c. Jon, 361.

Shall have his age. Jon. 361. 1 Sal. 243. Mod. Ca. 122.

So he may vouch. Jon. 361.

So, the descent shall generally be governed by the rules of the common law: and therefore, if tenant of lands of the nature of burrough English be seized in tail male, the descent shall be to the youngest son. Co. L. 110. b.

So, if such land be given to A. and his heirs, for the life of B., and A. dies, his youngest son shall take. Co. L. 110 b. 1 Sal. 244. R. 2 Lev. 138.

If there be a surrender to A. and his heirs, who dies before admittance, his youngest son shall have it. R. 1 Mod. 102. Cont. 1 Sal. 243. where the custom was found specially, that if A. die seized, it shall descend to his youngest son, but acc. if it was found to be burrough English.

If tenant in burrough English has a son by one ventre, and a son and daughter by another, and dies, and the youngest son enters, and dies, the daughter shall have it; for there shall be a *possessio fratris*. Jon. 361.

If he has three sons, and settles his estate to himself and his wife for life, remainder to his right heirs, and dies; the reversion descends to the youngest son. R. Jon. 361. Cro. Car. 411.

If the youngest son dies, and he afterwards purchases land of the nature of burrough English, it shall descend to the son, or daughter of the youngest. R. 1 Sal. 243. Mod. Ca. 120.

If tenant in burrough English be disseised, his youngest son shall enter. 1 Sal. 243.

So, if by custom, if there be no heir male, the descent be to the eldest daughter, and, if no daughter, to the eldest sister, and, if no

sister, to the eldest cousin; if the eldest daughter die in the life of her father, leaving a daughter, she shall have it within the custom, by descent from her grandfather. R. 1 Rol. 523. l. 45.

But the youngest son, being heir by the custom, shall not be bound by the warranty of his ancestor; for that descends to the heir at the common law. Jon. 361.

Nor, shall vouch upon a warranty made to the father and his heirs. Jon. 361.

So, if a descent be to the youngest son, who has no son, or but one, the custom shall be suspended, till there be a younger son *in esse*. R. Jon. 361.

So a particular custom may make a variance from the general custom. Jon. 361.

BYE-LAW.

(A) By whom it may be made. p. 302.

(B 1.) What shall be a good bye-law. p. 303.

(B 2.) For regulation of a man's right. p. 304.

(B 3.) Or, regulation of trade. p. 305.

(B 4.) Though a charge be imposed. p. 306.

(B 5.) Though there be no notice. p. 306.

(C) What shall not be a good bye-law.

(C 1.) If it be not allowed by the st. 19 H. 7. p. 306.

(C 2.) If it extends to a stranger. p. 307.

(C 3.) In restraint of trade. p. 308.

(C 4.) In restraint of a right. p. 309.

(C 5.) To charge the subject. p. 309.

(C 6.) If it be unreasonable. p. 309.

(C 7.) A bye-law void in part, is void for the whole. p. 309.

(D) What remedy shall be allowed upon a bye-law.

(D 1.) By debt, &c. p. 310.

(D 2.) By distress, &c. p. 310.

(E) What not.

(E 1.) By imprisonment. p. 311.

(E 2.) By sale, &c. p. 311.

(A) By whom it may be made.

A corporation (e) may make bye-laws, without an express power by their charter to make them. R. 10 Co. 31. a. R. Hob. 211. Per Holt,

(e) 1. If power of making bye-laws is by charter given to a select body, they do not represent the whole community, and cannot assume to themselves what belongs to it; if the power of making bye-laws is in the body at large, they may delegate their rights

Holt, C. J. Trin. 11 W. 3. Vide Mo. 579. 584. R. 5 Mod. 439. 1 Sal. 142. Carth. 482.

And such power a corporation has, though it be erected within memory. Cont. Mo. 869. Acc. Mo. 584.

Though it be erected for a particular cause; as, for regulation of navigation, trade, charity, &c.; as the Trinity-house. Dub. 2 Jon. 145.

So a custom to make a bye-law may be alleged in an ancient city, or borough.

So, in an upland town, which is neither city or borough, to make a bye-law for repair of the church, the good ordering of a common, or such like thing. Co. L. 110. b. R. Cro. Car. 498. Adm. Hob. 212.

So, by custom, the tenants of a manor may make bye-laws for the good order of the tenants. 1 Rol. 366. l. 35. Mo. 75. Adm. Hob. 212.

So may the homage. Adm. 1 Rol. 366. l. 16. Dy. 322. a. R. 1 Rol. 365. l. 35.

So, resiants in a leet. Mo. 579. 584.

And a leet by custom, may make a bye-law for good ordering of a common. R. Cart. 179.

So, for husbandry, or trade. Per Lea, C. J. Pal. 396.

So every town has power to make bye-laws, without special custom, for the public good: as, for repair of a church, highway, &c. R. 5 Co. 63. a.

And in such cases the major part binds the others. 5 Co. 63. a. 3 Leo. 265. Dal. 109. Mo. 579.

But the inhabitants of a town cannot, without a custom, make bye-laws for their private advantage; as, for the good ordering of a common, &c. R. 5 Co. 63. a.

And where they can, the major part does not bind the others, except where the custom warrants that also. R. 5 Co. 63. a.

So the tenants of a manor, homage, &c. cannot make bye-laws, without a custom. R. Sav. 74.

So a custom, that the steward, with the consent of the homage, may make them, is not good; for the homage ought to do it. R. 3 Lev. 49.

(B 1.) *What shall be a good bye-law.*

Every bye-law must be (*f*) *legi, fidei, rationi consona*. 8 Co. 126.

And,

rights to a select body. 3 B. M. 1827. — 2. A bye-law returned to be made by the body at large, may be good, where the power is given by charter to a select number to make bye-laws in the stead, for and in the name of the whole; for it might be made by the select body acting in the name of the whole; and if found to be made in due manner, it shall be so intended. 1 B. M. 127. — 3. A bye-law cannot superadd a qualification to an elector which the charter does not require. Thus, if charter gives the right of election to mayor, jurats, and commonalty, a bye-law cannot restrain it to mayor, jurats, and such of the commonalty as have served churchwarden and overseer. 3 B. M. 1827. — 4. Nor if the charter places the election in the mayor, aldermen, and commonalty, and the power of making bye-laws in the mayor and aldermen, can the mayor and aldermen, with the assent of the commonalty, take the right of election from the commonalty. 4 B. M. 2515.

(*f*) 1. Corporation by charter cannot make bye-laws inconsistent with the intention, or counteracting the directions of their charter. 4 Burr. 2204. — 2. But to avoid a bye-law upon the ground of contemplated inconvenience, the inconvenience must appear probable. 12 East, 22. — 3. The long continuance of a bye-law, though not sufficient

And, if it be lawful and reasonable, it will be good, though it be not confirmed, or allowed according to the st. 19 H. 7. 7. R. 5 Co. 63. b. 1 Rol. 363. l. 35. Vide post, (C 1.)

So, if it appears to the court to be reasonable, it is sufficient, though it be not averred to be so by pleading. 8 Co. 126. b.

So it may be reasonable, though the penalty be to be paid to those who make the bye-law. R. 1 Sal. 397.

So, generally, it shall be reasonable, if it be for the public good of the corporation. Carth. 482. (g)

(B 2.) For regulation of a man's right.—Vide post, (C 4.)

And therefore, a bye-law, made only for the regulation of any one in the use or exercise of that which he has a right to do, will be good; as, a bye-law that no commoner shall put his sheep in such a part of the common; for he is not restrained for all beasts, nor as to the sheep, for the whole common. R. 1 Rol. 365. l. 25. Cro. Car. 497.

Or, that he shall not put beasts upon the common till such a day. 1 Rol. 366. l. 30.

Or, till the farmer of the rectory there ring the bell; for he is an indifferent person. R. 1 Rol. 366. l. 20. Dy. 322. a.

So a bye-law for avoiding confusion in popular elections, that the mayor, or aldermen, &c. shall be elected by a select number, is good. R. 4 Co. 78. a. 3 Bul. 71.

So, a bye-law, that no one, not born in such a town, or an inhabitant there for three years, shall be allowed to inhabit there, without a testimonial of his good behaviour. Hard. 56.

So a bye-law, that every one, chosen sheriff of London, shall serve, unless he swears at the next hustings that his substance is not of the value of 10,000 l. and brings six witnesses, to be allowed by the mayor and aldermen, that they believe him, is good; for he ought to serve *de jure*, when he is chosen; and therefore the bye-law is in ease of him. R. Trin. 11 W. 3. B. R. Vanacker. 5 Mod. 441. 1 Sal. 142.

sufficient to legalize it, if in itself illegal, affords a fair presumption that there is no intrinsic inconvenience in it. 12 East, 22. — 4. A bye-law restraining the exercise of elective functions, heretofore possessed by the corporation at large, to a select body, is valid, where no inconvenience appears likely to result. 12 East, 22. 13 East, 367. — 5. A corporation has no power to exclude an integral part of the body, when a charter gives them the right of election. 4 Burr. 2515. — 6. A bye-law cannot superadd a qualification to an elector which the charter does not require. 3 Burr. 1827. *supra*. — 7. A bye-law inconsistent with the constitution of the corporation as prescribed by their charter, is void, 4 Burr. 2260.; though to supply a defect therein; thus a bye-law giving to the president of a select body, a casting vote in case of an equality of votes, where, by the charter, the election is to be by the majority: since this, in effect, is giving to the president the right of nomination. 6 T. R. 732. — 8. A bye-law which gives a voice in the election to any person to whom it was not given by the constitution of the borough, is bad. 15 East, 367.

(g) 1. A corporation having right to make bye-laws to govern the inhabitants, and to make secondary burgesses out of the inhabitants, and capital burgesses out of the secondary burgesses, make a bye-law, that every inhabitant chosen a burgess, and refusing to serve, shall forfeit, &c. This is a good bye-law; but it relates to inhabitants refusing to be secondary burgesses only, and not to secondary refusing to be capital burgesses. B. R. H. 284. — 2. A bye-law of a company, to elect such and so many of their members as should seem convenient, on pain to forfeit 25l. on refusing to accept or to pay admission-fee, is good; for the court will not presume the party elected is unfit; and if he is, it may be pleaded, or given in evidence on *nil debet*. 1 B. M. 235.

(B 3.) Or regulation of trade.—Vide post, (C 3.) Vide Trade, (D 2.)

So a bye-law for the regulation of trade will be good; as, that no one shall use (*h*) an hot press in London; for it is dangerous for fire, and deceit. R. 1 Rol. 365. l. 20.

That no one sell his cloth before it be searched at Blackwell Hall. R. 5 Co. 63. Mo. 580.

That such a baker bake white bread only, such an one only brown. Hard. 56. 2 Rol. 391.

That bricklayers do not plaister with lime and hair, which is proper to plaisterers. R. 2 Rol. 391. Pal. 396.

Nor archers make bows, or bowyers, arrows. 2 Rol. 391.

That coblers do not make boots or shoes, which belong to shoemakers. 2 Rol. 391.

So a bye-law to restrain the number of carts in London, without licence from Christ's Hospital, is good. 4 Mod. 228, 229. Cont. R. 1 Rol. 364. l. 25. R. acc. Ray. 288. 324. 328. 1 Sid. 284.

Or, hackney coaches. Dub. 4 Mod. 227. Skin. 371.

That no silk-throwster use more than so many spindles in a week. R. 1 Lev. 229.

That no one shall be a broker, unless he be licensed and sworn. Ray. 294.

That none shall take for journeyman any one not free of London. Hard. 56.

That none shall unlade coals out of a barge, if he be not of the porters' company. Semb. 3 Mod. 193.

So, where a power to make bye-laws is confirmed by parliament, or warranted by prescription, a bye-law will be good, which would not be so, if founded upon the charter only; and therefore, a bye-law in London, that no one, not free of the city, shall use a trade by retail there, will be good; for the customs of London are confirmed by parliament. R. 8 Co. 125.

(*h*) 1. General restraints of trade are bad; particular restraints, either as to time or place, are good, if for a sufficient consideration. Willes, 584. — 2. And a bye-law, by a trading company, prohibiting the individual members trading on their private account, is good. 8 T. R. 352. — 3. So semble, that a bye-law that members of one company shall not be members of different companies, is good. 2 M. & S. 60. — 4. So that a bye-law that a butcher in London shall be free of the butchers' company. 3 Burr. 1322. 1 Blk. 372. — 5. So that a bye-law by the mayor and common council of Exeter, that no butcher or other person should, within the walls of the said city, slaughter any beast under certain penalties; being not in restraint of trade, but only a regulation of it. Cowp. 269. — 6. So that no one shall exercise the trade of a joiner who is not free of the joiners' company. Str. 675. — 7. So that no stranger use the craft of a tailor in Bath, except first made free, under penalty of 3s. 4d. per diem; founded on custom that no stranger hath used said craft there, unless made free. 4 B. M. 1951. — 8. So that brewers' drays should not be in the streets of London after eleven in the forenoon in summer, and one in winter. Str. 1085. B. R. H. 405. Andr. 91. — 9. So that no person shall be made free of a company till called at three meetings of the mayor and aldermen of a city, and the warden and stewards of the companies in it, before his admittance, and approved by the majority; it not being a restraint upon, but a regulation of trade. 1 B. M. 127. — 10. So that no member of the company of surgeons of London shall take an apprentice who does not understand Latin, to be examined and tried by one of the governors. 2 M. B. 892.

That no one shall be allowed as an hawker in London, without licence, &c. Ray. 294.

That no one shall use a trade in a borough, not free there, where the bye-law is founded upon a custom to such intent, though the custom be not confirmed by parliament. Adm. Lut. 564. Adm. Godb. 254. 8 Co. 125. a. Court div. Cart. 69. 115. (i)

(B 4.) Though a charge be imposed.—Vide post, (C 5.)

So, though a bye-law impose a reasonable charge, it will be good, when he who pays it has a benefit by the bye-law; as if there be a bye-law, that every burgess in St. Alban's pay a reasonable sum for building of the courts, when the term was held there. Semb. 1 Rol. 363. l. 50. 5 Co. 64. a.

Or, for cleaning the borough upon the coming of the judges. Adm. Mo. 580.

Or, for his proportion of pontage, murage, &c. to be paid by the borough. D. Mo. 580.

So a bye-law, that a burgess shall make a feast at his election, is good. R. 2 Cro. 555.

That every one, admitted to the livery in the vintners' company, pay 317. 13s. 4d. when the custom warrants the payment of a reasonable sum, for the dignity and charges of the company. R. Ray. 446. Semb. 1 Sal. 349. 5 Mod. 319.

(B 5.) Though there be no notice.

So a bye-law will be good, though no notice of it be given to the party; as, if there be a bye-law at the court of a manor, notice is not necessary; for all the tenants of the manor shall be intended to be conusant. R. Cro. Car. 498. 1 Rol. 365. l. 50.

A bye-law, that a sheriff, chosen for London, shall forfeit 400 l. upon refusal, unless he swears at the next husting, that he is not worth 10,000 l. &c. Notice need not be given of the election; for every freeman ought to take notice. R. 5 Mod. 442. 1 Sal. 142. Carth. 484.

Though the liverymen only attend the election; for they represent the freemen. 1 Sal. 142.

(C) What shall not be a good bye-law.

(C 1.) If it be not allowed by the st. 19 H. 7.

But by the st. 15 H. 6. 6. a corporation shall not make an ordinance to the diminution or disherison of the franchises of the king, or others,

(i.) The following bye-laws of the college of physicians, were held reasonable. No person is admissible as a candidate for admission into the college, unless he has taken the degree of M. D. at Oxford, Cambridge, or Dublin; except, 1. that the president may propose, once in every other year, a doctor of physic of a certain standing, who may be admitted a fellow on approval by the college; 2. that any fellow may propose a doctor of physic at a certain age and standing, who, on approval at a certain meeting, may be admitted a fellow. 7 T. R. 282.

contrary

contrary to the common profit; or an ordinance of charge; but that is now expired. 1 Rol. 363. l. 10.

So, by the st. 19 H. 7. 7. no ordinance shall be made to the diminution or disherison of the prerogative of the king, or of others, or against the common profit, or to restrain a suit to the king, unless it be approved by the chancellor, treasurer, two chief justices, or three of them, or both the justices of assize, on pain of 40 l.

But this stat. extends only to guilds, fraternities, &c. not to cities, boroughs, &c. Per Att. Quo W. 44.

So an ordinance, not allowed according to the st. 19 H. 7. 7. is not void; but it cannot be executed without being subject to the penalty of the stat. 1 Rol. 363. l. 37. Per Att. Quo W. 44. R. 11 Co. 54. b. Vide ante, (B 1.)

(C 2.) If it extends to a stranger.

So a corporation, without authority of parliament, or an express prescription, cannot make a bye-law which shall bind a stranger. Per Curiam, 2 Vent. 33.

And therefore, a bye-law by the university of Oxford, that every one, *privilegiatus vel non privilegiatus*, found in the street after nine at night, without a reasonable excuse, shall forfeit 40 s. does not bind the townsmen. Semb. 2 Vent. 33.

So a bye-law that any person elected into an office, who refuses, shall forfeit 10 l. will be void; for thereby a stranger elected shall forfeit. R. 3 Lev. 294.

And though the words are, duly elected, and the person elected was a burgess, it will not be cured. R. 3 Lev. 294.

So a bye-law, by the homage, or tenants of a manor, does not extend to persons who do not hold of the manor. 1 Rol. 366. l. 36. R. Sav. 74.

So a bye-law by the corporation of butchers, that no one shall sell veal within the city, unless the kidneys are dressed as the kidneys of sheep, is void, as to a stranger. R. 1 Bul. 11.

So a bye-law by the corporation of Trinity-house, that every mariner, within twenty-four hours after anchorage in the Thames, put his gunpowder on shore, does not bind; because the corporation has no jurisdiction upon the Thames, &c. Semb. 2 Jon. 145.

So a bye-law by the corporation of horners, that none of the company buy horns within twenty-four miles of London, but of two persons by them appointed, is void; for they have not jurisdiction within twenty-four miles. R. 3 Mod. 159.

So a bye-law in London, that no one, coming to the port of London, shall use any other than a city porter. R. 1 Sal. 143.

A bye-law in Exeter, that no person, not being a brother of the society of cordwainers there, shall use the trade of a shoemaker, &c. within the city or county of Exeter. Bridg. 139.

But, if a fraternity, &c. be allowed to take men of another trade, or strangers, into their fraternity, a bye-law by them binds all of the fraternity, though strangers to the mystery. Mo. 579. 586.

So a bye-law by a corporation, &c. binds a stranger within their precinct; as, a bye-law for the regulation of common by the tenants of a manor,

manor, binds a stranger within the precinct of the manor. *Q. Hob. 212. Semb. Cart. 179. 1 Sal. 193.*

So a bye-law in London, that no freeman, or stranger, sell cloth within the city, before it be searched at Blackwell-Hall, is good against a stranger; for it is for an offence within the city. *R. 5 Co. 63. b.*

So a bye-law, that a man, elected sheriff of London and Middlesex at Guildhall, forfeit, &c. if he refuse the office, is good, though Middlesex be out of London; for the office and election is there. *R. in B. R. Trin. 11 W. 3. Vanacker. 5 Mod. 441.*

So, where a bye-law is made for prevention of fraud, or corruption, a stranger shall be bound. *Semb. 1 Bul. 12.*

As, that every foreigner, who sells goods usually sold by weight within London, shall carry them to be weighed by the king's beam, maintained by the city. *R. 1 Lev. 15. (k)*

(C 3.) In restraint of trade.—*Vide ante, (B 3.) Vide Trade, (D 2.)*

By (2) the st. 3 H. 7. 9. a bye-law in London, that no freeman shall sell his wares at a fair or market out of the city, was annulled. *1 Rol. 363. l. 25.*

By the st. 12 H. 7. 6. a bye-law by the merchant adventurers, that none sell, or buy in the dominion of the duke of Burgundy, without their licence, was annulled. *1 Rol. 363. l. 30.*

So a bye-law is void, that no one use his trade in such a town, who was not apprentice there at the same trade. *R. Mo. 869. R. 1 Rol. 364. l. 20. Hob. 211.*

Or, that no apprentice there use his trade, till seven years afterwards. *R. 1 Rol. 364. l. 12.*

That he shall not use his trade there without the allowance of the corporation of tailors, or three of the master and wardens, or proof that he was an apprentice; for it does not appear, what proof will be required, and therefore there may be a prohibition. *R. 1 Rol. 364. l. 45. 11 Co. 53. 1 Rol. 4. Godb. 253. Adm. Hob. 211.*

That he shall not use a trade in London, unless he be free of such a company; for he has a liberty of any company. *R. 5 Mod. 104, &c.*

That he shall not use a trade in a city, borough, &c. unless he be free there, where there is no custom for it. *R. Lut. 564. R. where the corporation was made within time of memory. 8 Co. 125. a. Adm. Godb. 253.*

So a bye-law is void, that no merchant-tailor put his clothes to be dressed but to clothworkers of the same company; for this amounts to a monopoly. *R. 1 Rol. 364. l. 35. 11 Co. 86.*

(k) 1. All inhabitants within the limits of a corporation, are amenable to the laws made for the good government of the place, though they be not corporators. *Cowp. 270.* — 2. And the crown may grant to a particular corporation the power of making bye-laws, in furtherance of the objects of their institution, binding upon third persons, as well as their own fraternity. *1 H. B. 370.*

(l) 1. A bye-law in restraint of trade is bad, unless there be a custom to support it. *3 Burr. 1847.* — 2. Hence a bye-law limiting the number of apprentices to be taken by freemen of the corporation. *7 T. R. 543.* — 3. And a custom warranting bye-laws to regulate the number of apprentices to be taken by the members of a corporation, will not authorize a bye-law altering their qualifications. *3 East, 186.*

Or,

Or, that he put one half of his clothes to them. R. Mo. 587. 591. 2 Inst. 47.

So, a bye-law, that one shall not sell any sand, except what he takes out of the Thames, is void. Ray. 293. Godb. 106.

(C 4.) In restraint of a right. — Vide ante, (B 2.)

So a bye-law for the total restraint of one's right, will be void: as, if a man be debarred the use of his land. R. Sav. 74.

If a commoner be excluded from the common. 3 Leo. 264.

So a bye-law that a commoner shall put no steer upon the common above a year old, is void.

(C 5.) To charge the subject. — Vide ante, (B 4.)

By the st. 34 Ed. 1. *de tallagio non concedendo*, no tallage or aid shall be laid or levied in our realm by us, or our heirs, without the assent of the bishops, barons, knights, and other freemen of our realm. Vide in Parliament, (H 9, &c.)

And therefore, every charge levied upon the people without assent of parliament, will be void. 2 Inst. 60, 61.

If a bye-law impose a charge, without an apparent benefit to the party, it will be void: as, a bye-law, that all coming to market pay 6*d.* per cart, &c. for standing there. Semb. in Quo W. per Treby 29. per Att. 42.

So a bye-law, that all carmen, who are licensed in London, pay 20*s.* for a fine upon admittance, and 17*s.* 6*d.* per annum to an hospital, is void. R. Ray. 328.

(C 6.) If it be unreasonable.

So a bye-law, not reasonable in any respect, will be void. (m)

So a bye-law, not good, shall not be allowed, because it is approved according to the st. 19 H. 7. 7. R. 11 Co. 54. b.

(C 7.) A bye-law, void is part, in void for the whole.

A bye-law, being entire (n) if it be unreasonable in any particular, shall be void for the whole: as, if the penalty be unreasonable.

Or, to be levied by imprisonment, sale, &c.

Or, to be levied by distress and sale; it will not be good for the distress. R. 2 Vent. 183. (o)

(D) What

(m) It cannot impose, or empower the administering of an oath. Str. 536.

(n) A bye-law may be good in part, and bad in part, provided the two parts are entire and distinct from each other. 8 T. R. 356.

(o) 1. Every bye-law may be repealed or new-modelled by the body which enacted it. 12 East, 22. 13 East, 367. — 2. Where, however, a power is given by the authority (whether statute or charter), creating the corporation, to inflict a specific punishment, they are precluded from inflicting any other. 1 T. R. 118. — 3. Corporations created by act of parliament, are upon a footing, and no more, with those created by charter. Neither, nor without an express power given to them, can they make bye-laws to incur a forfeiture. 1 T. R. 118. — 4 Where a bye-law declares, that if any offender shall deny, refuse,

(D) What remedy shall be allowed upon a bye-law.**(D 1.) By debt, &c.**

A bye-law may enact a penalty to be recovered by debt, &c. R. 5 Co. 64. a. 1 Rol. 366. l. 46.

So, it may ordain, that the chamberlain of London shall have debt for it. 5 Co. 63. b. 1 Rol. 366. l. 50. Mo. 403. (p)

So, if the bye-law does not mention how the penalty shall be recovered, debt lies upon it. 1 Rol. 366. l. 48.

So an action upon the case lies upon an assumpsit, for the penalty of a bye-law. R. 2 Lev. 252. Clift, 901, 902.

So a bye-law, that the penalty shall be recovered only in debt within the court of the city, &c. in which no essoign, is good, &c. R. 1 Lev. 15.

(D 2.) By distress, &c.

So a bye-law may enact, that the penalty shall be recovered, or levied by distress. 5 Co. 64. Adm. 3 Lev. 281. 1 Rol. 366. l. 42.

And though it do not say, what beasts shall be distrained, it will be good; for it shall be intended the beasts of the offender. R. Dy. 322. a. 1 Rol. 366. l. 10.

But a penalty cannot be levied by distress, without a prescription to levy, or the express words of the bye-law, that it shall be so levied. 1 Rol. 367. l. 5.

refuse, or neglect to pay the penalty thereby inflicted, he shall be liable to an action of debt; an action lies without a previous demand. 3 B. & P. 434. In justifying under a bye-law imposing a penalty for doing an act contrary to former bye-laws, these must be set forth. 3 Wils. 155. — 5. The means used for compelling payment of a penalty inflicted by a bye-law, must be such as are usual and reasonable. If the usage is silent, an action is the only remedy. But in no case can extraordinary measures be adopted, such as the infliction of an additional penalty for non-payment, namely, by depriving the delinquent of his profits as a member of the body in question, whilst the sum is unpaid. But, semble, to enforce payment, by deducting the fine from such profits, may not be unreasonable. 2 M. & S. 53. — 6. A corporation cannot give the right of suing for the penalty of a bye-law, to any other but the corporation. 2 Wils. 266. — 7. And where a penalty, under a bye-law, is given to the master and wardens to the use of the master, wardens, and company, (the corporation) the master and wardens alone can sue for it. 1 B. & P. 89. — 8. A count in debt for a forfeiture under a bye-law, must be special. 1 B. & P. 89.

(p) 1. The master, wardens, and commonalty of a company, cannot sue for a penalty forfeited to the master and wardens, to the use of the master, wardens, and company. 1 Bos. & Pull. Rep. 98. — 2. But in case a bye-law, made by the gun-makers company, inflicted a penalty, half to the use of the poor of the company, and half to the use of the discoverer, without saying who was to sue for it; whether the company may not. Willes, 384. — 3. In an action for a penalty for breach of a bye-law, whether it should not be positively stated that the defendant was subject to the bye-law when he did the act complained of. Ibid. — 4. And whether it be sufficient if it be stated to have been done on a day (after a viz.) after he was subject to the bye-law, as it appears on other parts of the declaration? Ibid. — 5. But a bye-law, that none but freemen shall keep shop, and which confines the action for the penalty to the portmote court, where none but the sheriff, or coroner (who must be freemen) can array a jury, is bad. 3 Bur. 1847. — 6. For though, in the regulation of its own members, a corporation may make bye-laws, and enforce the observance of them in its own courts, because every member is bound by the jurisdiction into which he voluntarily enters; yet it is contrary to the fundamental principles of law, that corporations should try their own suits against strangers. Per Lord Mansfield, 3 Burr. 1858.

So,

So, a penalty cannot be imposed upon a town, and levied upon a particular person, who cannot have contribution. R. 3 Lev. 49.

So a bye-law, that the offender shall be disfranchised, may be good. D. Mo. 412.

(E) What not.

(E 1.) By imprisonment.

But a bye-law, that the party, unless he obey, shall be imprisoned, is void, being contrary to magna charta. R. 5 Co. 64. a. 1 Rol. 363. l. 45. R. Mo. 411. D. 8 Co. 127. b. Adm. Sal. 349. Jon. 162.

Or, that he shall forfeit 40s. and for non-payment shall be imprisoned. R. 1 Rol. 364. l. 5.

But, by custom, a corporation may have power to commit, though not by charter, or bye-law. 1 Sal. 349.

So, by custom, a bye-law, with imprisonment for non-performance, may be good. Semb. 1 Sal. 397.

So, by the custom of London, one may be committed for refusal to be upon the livery. 2 R. Lev. 200.

(E 2.) By sale, &c.

So a bye-law, that a penalty be levied by distress and sale of the goods of the offender, is void. R. 8 Co. 127. b. R. 2 Vent. 183. 3 Lev. 282.

Though the officer who levies only distrains the goods, and does not sell them. 2 Vent. 183.

So, that a bond be given for performance. Semb. Ray. 227.

So a bye-law, that the party, unless he pay, shall forfeit his goods, is void. R. 8 Co. 127. b. D. 2 Vent. 183.

Or, that his bond, or covenant against the bye-law, shall be void, Semb. Mo. 411.

CALENDAR.

Vide TEMPS, (B 2.)

CANONS.

(A) What is the use of the civil law. p. 312.

(B 1.) The use of the canon law. p. 312.

(B 2.) What shall be so called. p. 312.

(C) What canons bind. p. 312.

(A) What is the use of the civil law.

In England use is sometimes (q) made of the civil, and of the ecclesiastical, or canon law. Co. L. 11. b.

Tempore Romanorum, viz. ab anno Christi 50, cum Claudius subjugavit Britannia partem, usque annum circiter 410, cum Alaricus tempore Honorii Romam cepit, (annos circiter 360), the civil, or imperial law was in use in Britain. Seld. Diss. ad Fl. 479, 480.

And afterwards it was used, for direction, where the law of England was silent; or for confirmation, where it was consonant. Seld. Diss. 464. 472.

(B 1.) The use of the canon law.

Tempore regis Stephani anno Dom. 1150, decretals were published for the government of the clergy. Dav. 70. a.

Afterwards the pope attempted to impose rogations, viz. ordinances, for days of abstinence of the laity, as well as of the clergy. Dav. 70. a.

Anno 1230 tempore Hen. 3. other decretals for the laity, as well as the clergy, were published. Dav. 70. a.

Decretals were first introduced in England, anno 25 Ed. 1. Dav. 71. b.

(B 2.) What shall be so called.

Jus canonicum est, quod ab ecclesia, aut viris ecclesiasticis institutum est. Lind. 76. v. Jus Canonicum.

These were collected in a book, viz. Codex Canonum, which at first contained 138 canons, afterwards 207, made by several councils, to which afterwards were added 85 apostolical canons, and several by other councils, with canonical epistles by divers popes. Afterwards the church of Rome made one Codex Canonum, which contained the apostolical canons, the canons of the 12 councils, and the decrees of 14 popes. Ayl. Int. 9, 10, &c.

The body of the canon law now used, being confirmed by pope Gregory 13th, comprehends the Decretum, the Decretals, the 6th book of Decretals, the Clementines, the Extravagants, and Common Decretals, and the 7th book of Decretals. Ayl. Int. 9. 19. 21. 25. 26, &c.

(C) What canons bind.

As to the power of making canons. Vide in Convocation (E).

All canons allowed, and used in England, become part of the ecclesiastical laws of England. Dav. 70. b. Vide in Prerogative, (D 10.)

So, all canons, or constitutions made in a convocation, or provincial synod within the realm. Dav. 72. b. R. Mo. 783.

By the st. 25 H. 8. 19. repealed by the st. 1 & 2 Ph. & M. 8. and

(q) The ecclesiastical canons are not all of them according to law, nor any of them obligatory, farther than as received and allowed time out of mind. 2 T. R. 555. Ld. Rd. 7.

afterwards revived by the st. 1 Eliz. 1. it was provided, that such canons, constitutions, ordinances, and synodals provincial, already made, which be not contrariant to the laws, statutes, and customs of the realm, nor to the hurt of the king's prerogative, shall be used as before the said act, till otherwise ordered by 32 persons to be appointed according to the said act.

And by the same statute, the king may nominate and assign at his pleasure 32 persons of his subjects, 16 of the clergy and 16 of the temporality of upper and nether house of parliament, who shall have power to examine canons, &c. before made, and such as the king and the major part of them shall deem worthy to be continued shall be obeyed, so that the king's assent under the great seal be first had to the same, and the residue shall be void.

And such nomination was allowed by the st. 27 H. 8. 15. the st. 35 H. 8. 16. and the st. 3 Ed. 6. 11.

But there never was any such nomination by H. 8. or Ed. 6. and therefore, all canons and consutations here received and allowed before that time, are now the ecclesiastical laws of the realm. Wat. 22.

And all persons are bound by them; for they are part of the constitution. Wat. 23.

And the common law courts will take notice of them as such. Wat. 23.

Canons made 3 Jac. by the convocation with the king's licence, and confirmed by the king, bind without confirmation by parliament. 2 Vent. 44.

They bind the clergy, but not the laity, unless they are confirmed by parliament. Carth. 485.

Yet it was resolved in the house of commons, 15 December 1640, *nemine contradicente*, that the convocation, &c. hath no power to make canons to bind the clergy or laity, without the common consent of parliament. 3 Rush. 1365.

But a canon shall not be allowed contrary to the common law. 2 Inst. 599. 647. 653. R. 12 Co. 72. per Vau. 2 Vent. 44.

Or, contrary to the king's prerogative, or the custom of the realm. 2 Inst. 653. 658. R. 12 Co. 72.

Or contrary to an act of parliament. 2 Inst. 658. R. 12 Co. 72.

And therefore, by the st. 25 H. 8. 19. it is declared, that a canon contrary to the king's prerogative, the law, statutes, or custom of the realm is of no force; and this was only declaratory of the common law. 2 Inst. 658.

So canons established in convocation by the king's licence do not bind laymen, but only ecclesiastical persons; for the laity are not represented in a convocation. Sal. 412. D. that they bind the whole kingdom, Mo. 783. They do not bind the temporality. 12 Co. 73.

So they bind only in ecclesiastical matters. Semb. Mo. 783. 12 Co. 73.

So canons established, &c. do not bind the laity. Per Tyrrell, 2 Vent. 43. But per Vau. in ecclesiastical matters they bind laics and ecclesiastics. 2 Vent. 44. (r)

(r) The canons of 1603, *proprio vigore*, (for some are only declaratory of the ancient canon law,) do not bind the laity. Str. 1056. B. R. H. 326.

So a canon, that was never received in England, is not part of the law ecclesiastical. Kel. 181. b. 184. Lat. 191. 2 Inst. 653.

And by the st. 25 H. 8. 21. it is recited, that England is free from subjection to any man's laws but such as have been made within the same; or, by sufferance of the king, the people by their own consent, and long use, have bound themselves to the observance of, not as to foreign laws, but as to the ancient laws of this realm originally established within the same, by such sufferance, consent, and custom, and not otherwise.

So the interpretation, execution, and dispensation of all canons allowed within England belong to the king, and his ministers. Dav. 70. b. Vide Prerogative, (D 11.)

CAPACITY.

(A) Who have capacity to purchase. p. 314.

(A 1.) Persons natural. p. 314.

(A 2.) Politic. p. 316.

(B 1.) Who not. p. 316.

(B 2.) By the statute of mortmain. — What is mortmain. p. 316.

(B 3.) What is not mortmain. p. 317.

(B 4.) By what names they shall purchase. — Persons natural. p. 317.

(B 5.) Politic. p. 318.

(C) Who have capacity to grant. p. 319.

(D) Who not. p. 320.

(D 1.) A man professed. p. 320.

(D 2.) A feme covert. p. 320.

(D 3.) An infant. p. 320.

(D 4.) A man insensible. p. 320.

(D 5.) A man non-sane. p. 320.

(D 6.) Attainted. p. 321.

(D 7.) Head of a corporation. p. 321.

(A) Who have capacity to purchase.

(A 1.) Persons natural.

Persons capable to purchase are natural, or politic. Co. L. 2. a.

All persons natural have a capacity to take by purchase.

Persons deformed, if they have human shape. Co. L. 3. b.

A deaf, dumb, and blind person. Co. L. 3. b.

An idiot, or a man of nonsane memory may purchase, without the consent of any other. Co. L. 2. b. 3. b.

And he himself can never avoid the purchase. Co. L. 2. b.

So

So if he recover his sanity, and afterwards agree to the purchase, his heir shall never avoid it. Co. L. 2. b.

But if he dies in his insanity, or recovers, and dies before agreement to the purchase, his heir may agree to, or waive the estate, without cause alleged. Co. L. 2. b.

A leper may purchase. Co. L. 3. b.

So an hermaphrodite, according to the prevailing sex. Co. L. 3. a.

A bastard, by his name of reputation. Co. L. 3. b. — Vide Bastard (E).

A man convicted or attainted of treason or felony, may purchase for the benefit of the king. Co. L. 2. b.

So a feme covert may take by purchase, till her husband disagree, or she after her husband's death waive it. Vide Baron and Feme, (P 2. — R.)

So a villain may purchase, but the lord afterwards may enter. Co. L. 2. b.

So an alien may purchase for the benefit of the king, or an house for his habitation. Co. L. 2. b. Vide in Alien, (C 2, 3.)

So an infant may purchase without the consent of another; for it shall be intended for his benefit. Co. L. 2. b.

But after his full age, he may agree to it, or waive it, at his pleasure. Co. L. 2. b.

And if he die before agreement, after his full age, his heir may agree to, or waive it. Co. L. 2. b.

So now, a monk, nun, &c. may purchase; for they were not disabled by the common law, and the canon law, whereby their disability incurs, is here abolished. 1 Sal. 162. (s)

(A 2.) Po-

(s) 1. A trustee cannot purchase the trust estate, or any part thereof. 1 Vern. 465. 5 Ves. 707. 2 Atk. 59. 3 Mer. 200. — 2. Whether the bargain be advantageous or not. 2 B. C. C. 627. 400. 10 Ves. 593. 1 Ves. 9. 385. 395. 6 Ves. 627. 10 Ves. 385. — 3. Nor can he purchase for his own benefit a renewal which the owner refused to sell to the *cestui que trust*. 10 Ves. 395. Vide 7 B. P. C. 367. 213. 1 S. & L. 131. — 4. Yet a purchase by a trustee, when found to be for the benefit of an infant *cestui que trust*, will be enforced. 13 Ves. 603. 6 Ves. 631. — 5. And though a trustee cannot purchase from himself, he is allowed to purchase from his *cestui que trust*, provided there is a clear and distinct contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and there is no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee. 9 Ves. 246. 12 Ves. 373. 2 B. C. C. 400. Vide 13 Ves. 601. — 6. And if an estate be vested in trustees for sale, for the benefit of an infant, and the trustee is desirous of becoming a purchaser, he may file a bill for the purpose of carrying the trust into execution, under the direction of the court, and upon the sale may apply to the court for leave to become the purchaser, upon offering to give more than any other person. 5 Ves. 681. — 7. As, and upon the same principal that trustees cannot purchase, so cannot commissioners of bankrupt, whether bidding for themselves or others. 6 Ves. 617. 12 Ves. 6. — 8. Nor assignees. 6 Ves. 627. 8 B. P. C. 42. — 9. Nor the solicitor to the commission. *Supra* tit. Bankrupt. — 10. Nor can the committee purchase the lunatic's estate. 1 Mad. T. 91. — 11. Nor as it seems can an executor purchase his testator's effects. 18 Ves. 170. — 12. Nor can governors of a charity take leases of the charity land. 17 Ves. 500. — 13. And the rule holds between principal and steward or agent, 13 Ves. 47. 5 Ves. 485. 7 Ves. 599. 11 Ves. 358. 13 Ves. 95. 2 S. & L. 492. Sed vide 1 B. C. C. 558. — 14. But not as between mortgagor and mortgagee. 2 S. & L. 673. — 15. A purchase of trust property, by trustees for their own benefit, was set aside after a considerable lapse of time, and several assignments. Cooper, 146. Vide *Id.* 201. — 16. An attorney may purchase of his client; but in such case the attorney

(A 2.) Politic.

A body politic is sole, or aggregate. Co. L. 2. a. Vide Franchises, (F 1, &c.)

A corporation aggregate consists of many persons, all capable of purchasing, or one capable, and the others incapable. Co. L. 2. a.

A corporation sole, as the king, a bishop, a parson, &c. may purchase to him and his successors. Co. L. 250. a.

So a corporation aggregate, where all are capable; as, a mayor and commonalty. Vide Co. L. 250. a.

Dean and chapter.

So where one is capable, and others incapable; as, an abbot may purchase without the consent of the convent, and cannot afterwards avoid it. Co. L. 2. b.

But his successor for good cause, and not otherwise, may waive the purchase. Co. L. 2. b.

As, if the rent reserved exceed the value of the estate. Co. L. 2. b.

(B 1.) Who not.

But a monster, who has not an human form, cannot purchase. Co. L. 3. b.

Nor a man professed in religion, for he is dead in law; as a monk, friar, nun, &c. except when they are sovereigns of an house of religion. Co. L. 3. b. 132. b.

So a community not incorporated cannot purchase; as, the parishioners or inhabitants of D. Co. L. 3. a.

The commoners in such a waste cannot take by grant of the lord, Co. L. 3. a.

So churchwardens cannot purchase lands, (but goods only). Co. L. 3. a.

(B 2.) By the statute of mortmain. — What is mortmain.

By the st. 7 Ed. 1. *de religiosis*. *Si quis religiosus, vel alius*, (for magna charta, 9 H. 3. 36. extends only to a religious house which purchases, 2 Inst. 75.) purchase lands or tenants in fee, the lord of whom the lands are holden may enter within a year; or, if he be negligent, the next lord within half a year; or, if he neglect, the king may enter.

So by the st. W. 2. 13 Ed. 1. 32. if he obtain a recovery by collusion. 2 Inst. 429.

And by the st. 15 R. 2. 5. if there be a feoffment to the use of such an one.

And these statutes extend to every corporation, sole or aggregate, ecclesiastical or temporal. Co. L. 2. b. 2 Inst. 75.

attorney, to support his purchase, must be able to shew that he paid the full amount he could have obtained from any other person. 15 Ves. 42. 1 Mad. T. 95. Vide 1 B. & B. 104. — 17. And the same rule prevails in a sale by an attorney to his client. 6 Ves. 278. — 18. A purchase from his client by a solicitor, who was also trustee for the sale of the estate for payment of debts, was confirmed, upon the ground of his having attempted ineffectually to sell, of there being no fraud in the transaction, and of the purchase having been recognized and approved of by the *cestui que trust*. 2 Edeu. 154. Vide 18 Ves. 304.

If lands are granted to them upon an exchange. Kit. 39. b. F. N. B. 223. E. F.

If an advowson be appropriated to them. F. N. B. 223. H. Kit. 39. a.

Or, a rent-charge granted. F. N. B. 223. B. Kit. 38. b. 139, b.

So if lands are devised to them. F. N. B. 224. F.

So if a bishop enter upon land purchased by his villein, it is mortmain. F. N. B. 224. b. Kit. 38. b.

If a bishop, or other corporation alien to another and his successors. F. N. B. 222. D. Kit. 38. b.

By the st. 23 H. 8. 10. feoffments, fines, wills, &c., to the use of the parish church, chapel, guilds, commonalties, &c. or to find obits, priests, &c. which are to have continuance above 20 years, shall be void.

If there be an alienation in mortmain of things not held, as of a villein, rent-charge, common, advowson, &c.; the king shall have them presently. Co. L. 2. b.

(B 3.) What is not mortmain.

But if an annuity be granted to a corporation, it is not mortmain; for that charges the person only. Co. L. 2. b.

So if goods and chattels are granted. Kit. 139. b.

So a grant of a distress in other lands for an ancient rent. Q. F. N. B. 224. G. Kit. 39. b.

A release of rent to the tenant. Kit. 39. a.

A recovery in value upon voucher. Kit. 39. b.

So the king by his licence may dispense with an alienation in mortmain. Kit. 39. b.

And before such licence an *ad quod damnum* antiently issued; but it is not now used. F. N. B. 222. D. Vide st. 27 Ed. 1.

But such licence does not bind the other lords. Vide F. N. B. 222. D. Kit. 139. a. b.

And therefore, it was enacted by the st. 7 & 8 W. 3. 37. that the king may licence to a lien, or take in mortmain.

So a devise to a charitable use within the st. 43 Eliz. is not mortmain.

Though the devise be to a college. R. 1 Lev. 284.

(B 4.) By what names they shall purchase. — Persons natural.

A man regularly ought to purchase by his name of baptism, and his surname. Co. L. 3. a.

But if he purchase by his name of confirmation, it is sufficient. Co. L. 3. a. and that ought to be used. 1 Brownl. 47.

So, if there be a certain description of the person who purchases, although his christian and surname are omitted, it is sufficient. Co. L. 3. a.

As if a grant be to the earl of Pembroke, the bishop of London, &c. by his name of dignity; for the person is certain. Co. L. 3. a.

To the Chester herald, &c. R. 2 Rol. 44. l. 15.

To the wife of B. Co. L. 3. a.

Primo, aut secundo filio, seniori puero, natu minimo, omnibus filiis, filiabus, liberis, exitibus, aut rectis hæredibus de B. Co. L. 3. a. R. Mo. 104.

And

And *primo puero*, may be to the first child, though it be a female, if it be so explained by any other writing. R. Mo. 104.

If it be, to the issue male, his first issue male shall take. R. 3 Lev. 433.

So though his christian name be added, and mistaken. Co. L. 3. a.

So if there be a limitation to the heir male of the body of his grandfather, the heir male shall take, though there be an heir general alive; for the description is sufficient to make him take by descent, and therefore it shall be well by purchase. R. 2 Ver. 730.

But if there be a description of a person certain *in esse*, and there is no such one *in rerum natura*, a person who afterwards answers to the description cannot take; as, if a remainder be limited to B. the wife of A., though A. afterwards marry B. before the particular estate ends, she cannot take. Mo. 104.

Vide Fait, (E 3.)

(B 5.) Politic.

So a corporation, regularly, ought to purchase by its name of incorporation; and therefore, a grant by or to the master and wardens of cooks in London, whereas they are named, master and governors, will be void. R. Pl. Com. 537. b.

The master of St. Peter's, where the name is, the master of St. Peter's and St. Paul's. Bro. Corporation, 8.

The provost, &c. of the house of N. where it is a chauntry. Bro. Corporation, 21, 22.

The dean and chapter *cathedralis ecclesiæ sanctæ & individue trinitatis N.* omitting, *ex fundatione Reg. Ed.* 6. Adm. 3 Co. 75. 2 And. 166, 167. Jon. 170.

Collegium regale de Eton, where the name is, *collegium beatæ Mariæ de Eton.* Dy. 150. a. 1 And. 23. Mo. 13.

The dean and canons *liberæ capellæ de W.* where the name is, the dean and canons *capellæ St. Geo. Martyr de W.* 1 Leo. 162.

The master *collegii de Merton in Oxonia*, where the name is, *collegium scholarium de M. in universitate Oxoniæ.* 1 Leo. 162. Cont. Mo. 266.

The presbyters and chaplains of St. Stephen's, where the name is, The dean, canons, and vicars of St. Stephen's. 2 And. 166.

The provost and scholars of Queen's college in the university of Oxford, where the name is, the provost and scholars *aule reginæ de Oxford.* Dub. Lane, 15. 33.

Yet an addition to a name does not avoid the purchase, but shall be rejected: as, if the master and brethren are named, the master and brethren *sive socii.* R. 11 Co. 20. a. Bro. Corporation 8. 62.

If the master, &c. of the mystery of cooks, are named, of the craft and mystery. Pl. Com. 537. b.

If the hospital *H. 7. regis Angliæ* be named, the hospital *H. 7. nuper regis.* R. 1 Leo. 159.

If *collegium Christi in Oxonia* be named *collegium Christi in academia Oxoniæ.* R. Mo. 361. Vide Mo. 865. Sav. 129. R. Poph. 56.

If any ornament to a name be added, or omitted. Poph. 156, 7.

Nor an immaterial variation; as, a lease by the dean and chapter of Exeter, instead of in Exeter. R. 2 Leo. 97. 2 Rol. 42. l. 45.

By

By the master *domūs sivi collegii*, instead of, *domūs sive hospitalis*; for a college and hospital are the same. Semb. 1 Leo. 215.

Collegii trinitatis, instead of, *collegii sanctæ & individuæ trinitatis*. 1 Leo. 161.

The dean and chapter *ecclesiæ de Peterborough*, instead of, *ecclesiæ Petriburgensis*. 1 Leo. 159. Cont. 1 And. 23.

Magister collegii, instead of, *magister aulæ*, &c. R. 11 Co. 22. b.

Magister hospitalis H. 7. de Savoy & capellanus prædicti hospitalis, instead of, *magister & capellanus hospitalis H. 7. de Savoy*. R. 1 Leo. 159. Acc. Dy. 278. Mo. 865.

The minister of God of the poor house of D. instead of, the minister of the poor's house of God of D. Dub. 2 And. 117. R. Mo. 865.

Major & ballivi villæ de D. & burgenses ejusdem villæ, where the name is, *major & burgenses villæ de D.* R. 1 Rol. 119.

The dean and chapter *ecclesiæ Petriburgensis*, instead of, *sancti Petriburgensis*. Mo. 14. Cont. 1 And. 23.

So, if a statute or testament give a certain description, it is sufficient, though the name be not observed: as, if advowsons of recusants are given to the university of Cambridge. R. 10 Co. 57. b. 11 Co. 21. b. 2 Leo. 165.

So in grants and conveyances, it is sufficient, if the same name *in re et sensu* be used, though not *in verbis*. R. 10 Co. 124. (t)

So by a verdict, or an averment, a misnomer may be aided. 10 Co. 125. b.

So, if an ancient corporation be incorporated *de novo*, with an addition to the name; a lease, &c. by the ancient name will be good. R. Jon. 167.

(C) Who have capacity to grant.

Every person, being a natural and lawful subject, of sane memory, and full age, may make a feoffment, grant, lease, &c. Co. L. 42. b. Vide Grant, (A 1.)

Though he be a bastard. Co. L. 42. b.

Convict of heresy. Co. L. 42. b.

A leper removed by the king's writ *a societate hominum*. Co. L. 42. b.

Though he be deaf, dumb, or blind, if he has good sanity, and discretion. Co. L. 42. b.

(t) 1. A corporation, entitled "The wardein and poore of the hospitall of the Holy Trinitie in C., of the foundation of J. W. archbishop of C." by deed sealed with their common seal, in which they describe themselves as "the warden and poor of the hospital of the Holy Trinity in C.", omitting the name of their founder, sell part of their estates for 50*l.* paid in discharge of the costs of the sales made by them for the redemption of their land-tax. Held, 1. That the mis-description of the corporation, in omitting the name of their founder, was immaterial; and that if it had been material, it would have been cured by 54 Geo. 3. c. 173. s. 12. 2. That the application of the 50*l.* to defray the expences of the sale of the corporation's other estates, was a valid payment within 39 Geo. 3. c. 6. s. 36. 2 Mar. 174. 6 Taunt. 467. — 2. A misnomer of a corporation in a devise to them, shall not vitiate, where it can be collected to what corporation it was the testator's intent to devise. 7 Taunt. 546.

(D) Who

(D) ~~Who~~ not.

(D 1.) A man professed.

But a person professed in religion (who is *civiliter mortuus*), as a monk, friar, canon, &c. cannot make a grant; for his grant shall be void.

Yet the sovereign of an house of religion, as an abbot, prior, &c. may make a grant, &c. Vide Co. L. 132. b.

So may a monk, friar, &c. in the name, and by the assent of his sovereign.

Or, as a farmer of the king, in respect of his farm.
L. 132. b. Vide Abatement, (E 5.) Vide Co.

(D 2.) A feme covert.

So a grant by a feme covert, without the assent of her husband, will be void. Vide Baron and Feme, (Q).

Yet a fine, or common recovery of her own land, will be good, till it be avoided by her husband. Vide Baron and Feme, (P 1.)

So, a grant *en autre droit*, as executrix. Vide Baron and Feme, (P 3.)

So, if a woman make a grant when sole, and deliver the deed as an escrow, to be her deed upon conditions performed, and before the conditions performed she takes husband, and then the conditions are performed, it will be good; for after performance it has relation to the delivery. Per Grant, 9.

So, if a feme covert deliver a deed when covert, and after the death of her husband deliver it *de novo*; it shall be good by the second delivery; for the first delivery was entirely void. 2 Rol. 26. l. 3.

Vide Fait, (A 3. — B 5.)

(D 3.) An infant.

So a grant by an infant by deed will be void, if it seems to his prejudice. Vide Infant, (C 2.)

So, if the grant takes effect by livery from his hand, or seems to his advantage, yet it is voidable, and may be avoided by him or his heirs. Vide Infant, (C 3, &c.)

(D 4.) A man insensible.

So a man, who has no understanding, as if he be dumb, deaf, and blind from his birth, has not a capacity to grant, but his grant will be void. Per Grant, 25.

(D 5.) A man non-sane.

So a man of non-sane memory, has not a capacity to make a grant, that shall bind his heir, or any other besides himself. Vide Ideot, (C — D 1, &c.)

' And

And therefore, if an idiot, lunatic, &c. make a feoffment, grant, or gift, &c. his heir shall avoid it. Vide Per. Grant, 21.

So, if he make a feoffment with a letter of attorney to make livery when non-sane, and afterwards he comes to a good memory, and then livery is made without any other assent; his heir shall avoid it. Per. Grant, 23.

But a man non-sane cannot avoid his grant, &c. during his life; for he cannot disable himself. Per. Grant, 21.

So, if the grant be by matter of record, as by fine, &c. his heir shall not avoid it. Per. Grant, 24.

(D 6.) Attainted.

So a person attainted (*u*) of treason or felony has not a capacity to make a grant that shall bind the king, or the lord of whom the lands are held. Vide Per. Grant, 26.

But a grant by a person attainted binds himself and his heirs. Vide Per. Grant, 26.

(D 7.) Head of a corporation.

So the head of a corporation aggregate has not a capacity to bind the corporation by his grant, without assent of the community under the common seal: as, if a mayor make a feoffment, or grant of land, or a grant of a rent, &c. out of land, without assent of the commonalty under the common seal, it will be void. Vide Per. Grant, 31.

So, the master of an hospital or college, without assent of the brethren. Vide Per. Grant, 31.

So a grant by the head of a corporation sole binds only himself, but not his successor: as, a grant by an abbot, prior, &c. without assent of the convent. Vide Per. Grant, 31.

By a bishop, without assent of the dean and chapter.

By a dean, without assent of the chapter. Vide Per. Grant, 31, 32.

Who may sue, and be sued, and who not. Vide ACTION; (B 1, &c. — C 1, &c.) — ABATEMENT, (E 1, &c. — F 1, &c.)

Who may devise, and take by devise, and who not. Vide DEVISE, (G.—H 1, &c. — I. — K.)

Who may marry, and who not. Vide BARON and FEME, (B 1, &c.)

CAPE.

Grand cape. Vide PROCESS, (D 4.)

Petite cape. Vide PROCESS, (D 5.)

(*u*) Semble, that a fine levied by a felon before conviction is operative.
2 Wils. 219.

CAPIAS.

Vide PLEADER, (2 W 3).

Capias ad satisfaciendum. Vide EXECUTION, (C 9, &c.)—BAIL, (R 4.)

Capias pro fine. Vide EXECUTION, (B 1, 2.)

Capias si Latus. Vide STATUTE STAPLE, (D 4.)

Capias Utlagatum. Vide PLEADER, (2 W 6.)—UTLAGARY—WALES, (B 2.)

Testatum capias. Vide PROCESS, (E 7.)

CAPIATUR.

Vide LEET, (O 7, 8.)

CARRIER.

Vide ACTION UPON THE CASE FOR NEGLIGENCE, (C 1, &c.)

CASE.

Vide ACTION UPON THE CASE.

CASTLE.

(A) Castle-guard.

Aid for the keeping of a castle continues, though the castle be destroyed. R. Mo. 1.

CASU PROVISIO.

Writ of entry in casu proviso. Vide DUM FUIT INFRA ÆTATEM, (D).

CASU CONSIMILI.

Writ of entry in consimili casu. Vide DUM FUIT INFRA ÆTATEM, (E).

CASUAL PROFITS.

Vide PREROGATIVE, (D 49, 50.)

CATHEDRAL.

Vide CEMETERY, (A. 3.)—ESGLISE, (B).

CATTLE.

Vide DISMES, (H 5, &c.)

CAUSE OF ACTION.

Vide ABATEMENT, (G 4, &c. — H 24.) — ACTION, (E — F — G — I).

CAUTION.

Vide ADMIRALTY, (E 19.) — BAIL, (D.)

CEMETERY.

(A 1.) Church-yard. p. 323.

(A 2.) To whom the profits belong. p. 323.

(A 3.) What privileges belong to the church-yard.
p. 324.

(B) Burial. p. 324.

In what place it shall be.

(C) Tomb, monument, etc. p. 325.

(A 1.) Church-yard.

The church-yard is, *totus fundus, qui infra clausuram ipsius continetur*. Lind. 267. v. Cœmeteriis.

The church-yard, *circa ecclesiam majorem 40 passus continere debet, circa minorem 30 passus*. Lind. 253. ver. Claus. Cœmet.

(A 2.) To whom the profits belong.

The soil and profits of the church and church-yard belong to the parson. Vide Eglise, (G 1.)

Or to the vicar. Vide Ecclesiastical Persons, (C 14.)

And the parson may make a lease of the church-yard.

If he lease his parsonage, the church and church-yard pass.

If any cut corn or trees there growing, trespass lies by the parson or his lessee. (*)

By usage in London, the churchwardens take the money for burying in the church or church-yard, and the parson has nothing but in the chancel. 2 Sho. 184.

(*) And where the parson libelled in the spiritual court for cutting elms in the church-yard, the defendant obtained a prohibition on suggestion that they grew on his freehold. 1 Ld. Rd. 212.

So the inclosure of the church-yard belongs to the parishioners.
Vide Prohibition, (G 3.)

(A 3.) What privileges belong to the church-yard.

Cemeterium gaudet eodem privilegio, quo ecclesia. Lind. 256. v. Cemetery, 270.

And, therefore, before sanctuary was taken away, churches and church-yards had the privilege of sanctuary. Vide st. 32 H. 8. 12.

By the st. of Wint. 13 Ed. 1. 6. fairs and markets shall not be kept in church-yards, for the honour of the church.

By a constitution at Oxford, anno Lind 270. *Judicium sanguinis*, (i. e. *Causa per judices seculares de effusione sanguinis, aut corporali pœnâ ne tractetur in ecclesia, aut cœmeterio.*

So by the 88th canon, anno 1603, the churchwardens and their assistants shall suffer no plays, feasts, banquets, drinkings, temporal courts, or leets, lay-juries, musters, or other profane usage in the church, or church-yard.

So by the st. 5 Ed. 6. 4. if any by words only quarrel, chide, or brawl in the church or church-yard, the ordinary on proof by two witnesses may suspend him, if lay, *ab ingressu ecclesia*, if clerk, *ab officio*, as long as he thinks meet.

If any smite or lay violent hands on another, he shall be *ipso facto* excommunicate.

If any maliciously strike with a weapon, or draw a weapon to strike in the church or church-yard, and be convicted by verdict (*y*), confession, or two witnesses before the justices of assize, oyer and terminer, or the peace, he shall lose one of his ears, or if none, be stigmatized on the cheek with a hot iron with the letter F. and besides stand *ipso facto* excommunicate.

Cathedral churches are within this statute, and church-yards which belong to them. R. Cro. El. 224. 1 Leo. 248.

So it shall be within the statute, if any smite or draw a weapon to smite, &c. in his own defence. Vide Noy, 171.

But the indictment must say, *quod malitiose percussit, or extraxit cum intentione ad percutiendum.* R. Noy, 171, 2.

So he shall not be excommunicated, 'till the conviction transmitted to the ordinary, and sentence upon it, though the statute says he shall be *ipso facto* excommunicated. Dub. Dy. 275. b. But acc. in marg. R. Cro. El. 919.

'Till the conviction transmitted, but that is sufficient without sentence upon it. R. 1 Vent. 146.

(B) Burial.

In what place it shall be.

Burial was the usual character of a parochial church. Seld. de Dec. c. 9. sect. 4. Vide Eglise, (C).

(y) 1. The ecclesiastical court had jurisdiction to give sentence of excommunication; and there must have been a sentence declaratory at least, for striking in a church-yard. B. R. H. 190. — 2. And this might have been done without any prior conviction. Ibid. — 3. Unless on the third clause of striking with, or drawing a weapon, and there a temporal punishment (the loss of an ear) being inflicted, and the excommunication and accumulated punishment, a prior conviction was requisite. Ibid.

And therefore every person (who may have christian burial) may have burial in the church-yard where he dies, by the general custom of England.

And that without any fee for breaking up the soil. R. 1 Sal. 334. (z)

Though the church-yard be in a city, where anciently no burial was allowed without the king's licence.

So by the canon, *ne cui pro pecunie denegetur sepultura, sed si quid devotione fidelium consuetum fuerit erogari, volumus per ordinarium loci ecclesiis justitiam fieri.* Lind. 278, 279.

And, therefore, *in ecclesia, vel cæmeterio, pro sepultura nihil exigi debet, nec pro officio sepulturae.* Lind. 278.

So, though by the canon, *laicus non sepeliatur in ecclesia, nisi in cæmeterio.*

Yet by the custom of England, every one (who shall have christian burial) may have burial in the common part of the church or chancel, paying the usual fee to the parson for breaking up the soil. Vide Esglise, (G 1.)

The usual fee is 3s. 4d. in the church; 6s. 8d. in the chancel.

Or by custom it may be more. 1 Sal. 334. 2 Keb. 778. 3 Keb. 523.

So by custom, the fee shall be paid to the churchwardens, though of common right it belongs to the parson.

So a man may prescribe, that he is tenant of an ancient messuage, and ought to have separate burial in such a vault within the church.

Or in such an isle, or the quire.

And if he be disturbed, he may have an action upon the case. 2 Cro. 606. (a)

So, though by the canon, a man shall be intombed, *ubi decimas persolvebat vivus.*

Yet he may by his will appoint his burial at such a monastery, &c. as he pleases. Seld. de Dec. c. 9. sect. 4.

And if the burial be out of the parish where he died, the parson of the parish where he died cannot prescribe for a fee for his funeral, unless he was a parishioner there. R. Hob. 175.

So, although he was a parishioner; for he ought not to have a fee, where nothing is done. Semb. Sal. 332.

But by the canon a *felo de se* shall not have burial in the church, or church-yard, without a licence from the bishop or ordinary.

Nor a man excommunicated.

(C) Tomb, monument, etc.

So an heir or executor may erect or set up a tomb-stone or other monument in a convenient place within the church or church-yard, for the honour of his ancestor there buried.

And if any one pull down or deface such tomb-stone or monument, the heir may have an action for it. Co. L. 18. b.

(z) 1. Willes, 356. — 2. It may be due by custom in any particular parish. Ibid. — 3. The burial fees in St. George's, Bloomsbury, are directed by stat. 3 Geo. 2. c. 9. to be fixed by certain commissioners. Ibid.

(a) But a custom, that every parishioner has a right to bury his dead relations in the church-yard, as near to their ancestors as possible, is bad. 2 Wils. 28.

So if any deface the arms, pennons, &c. put up in a window or elsewhere, in honour of his ancestor. Co. L. 18. b.

Though they are defaced by the parson, ordinary, or churchwardens, as well as by a stranger. R. 2 Cro. 367.

So the wife or executors who set them up may have an action for defacing them in their time. Co. L. 18. b.

But a monument, tomb, &c. cannot be erected to the hindrance of divine service. 3 Inst. 202. (b)

CENSURES.

Ecclesiastical censures. Vide PREROGATIVE, (D 12.)

CERTAINTY.

Vide ABATEMENT, (H 5.) — ACTION UPON THE CASE UPON ASSUMPSIT, (A 3, &c. — H 3.) — ACTION UPON THE CASE UPON TROVER, (G 2, &c.) — APPEAL, (G 6.) — ARBITRAMENT, (E 11.) — COPYHOLD, (S 19.) — GRANT, (E 14. — G 5, 6.) — INDICTMENT, (G 1, &c.) — INFORMATION, (D 2.) — MANDAMUS, (D 5.) — OBLIGATION, (B 2.) — PLEADER, (C 17, &c. 48: — E 5, &c. — F 17. — S 21. 41, 42. — 2 W 7. — 2 Z 1. — 3M 5.) — PRESCRIPTION, (E 3.) — RENT, (B 7.) — RETURN, (E 1, 2.)

CERTIFICATE.

(A) Trial by certificate of the bishop.

(A 1.) When it shall be. p. 327.

(A 2.) When not. p. 327.

(A 3.) By whom the certificate shall be. p. 329.

(A 4.) If the see be vacant. p. 329.

(A 5.) Upon what foundation, and at what time. p. 330.

(A 6.) How it shall be made. p. 330.

(B) Trial by certificate of the recorder of London. p. 330.

(C) Trial by certificate of the marshal, etc. p. 331.

(b) 1. monuments cannot be erected without the consent of the ordinary, which must be given according to a prudent and legal discretion, which the superior has a right to look into and correct. 2 Str. 1080. And. 69. — 2. And an appeal lies from the ordinary to the arches, Ibid. If the consent of the rector be necessary before the ordinary grant such licence, and it be granted notwithstanding his dissent, it is a ground of appeal. 3 East, 217.

(A) Trial

(A) Trial by certificate of the bishop.

(A 1.) When it shall be.

If there be issue upon general bastardy, it shall be tried by the certificate of the bishop. Vide in Bastard, (D 2.)

So, if the issue be *an unques accouple en loyal matrimony*. 2 Rol. 584. l. 52. Vide in Pleader, (2 Y 10.)

If the issue be, whether there was a divorce. 2 Rol. 585. l. 47.

Whether there was bigamy. 2 Rol. 587. l. 7.

Whether a man was professed in religion. 2 Rol. 584. l. 12. 586. l. 51.

So, whether he was professed of such an order. 2 Rol. 584. l. 10. 586. l. 53.

So, where the issue is, whether a prior was dative or perpetual. 2 Rol. 587. l. 10. 584. l. 20.

So, where the issue is, whether a clerk were instituted or not, it shall be tried by the ordinary. 2 Rol. 584. l. 3. Dy. 78. b.

So, full or not full; for the church is full by institution. 2 Rol. 583. l. 52.

So an issue, whether a clerk was able or not, when the clerk is alive. 2 Rol. 583. l. 40.

Whether a clerk resigned or was deprived. 2 Rol. 583. l. 45, 6.

Whether a church be void by deprivation. 2 Rol. 583. l. 45.

Whether a bishop be consecrated or not. 2 Rol. 588. l. 30.

Though the issue be upon the time of the consecration. 2 Rol. 588. l. 35.

So, if the issue be, whether the dean or another is guardian of the spiritualties. 2 Rol. 588. l. 26.

Whether a clerk was *infra sacros ordines*. Adm. 2 Lev. 250.

Or was so at the time of his institution; for the time here refers to the institution, which shall be tried by the ordinary. Semb. 2 Lev. 250.

So an issue, whether excommunicated or not, shall be tried by the ordinary. Co. L. 134. a.

Whether an executor refused to make probate of a will. Semb. 1 Leo. 205.

So by the st. 1 Jac. 4. whether a recusant conformed. Hard. 62.

(A 2.) When not.

But if a matter of spiritual cognizance is not directly in issue, it shall be tried by the country; as, where bastardy is not directly in issue. Vide Bastard, (D 2.)

If the issue be, wife or not wife, espoused or not, &c. 2 Rol. 585. l. 10. 17. Sho. 50. Sti. 10. 1 Leo. 53.

Whether feme sole or covert. 2 Rol. 585. l. 7. 12. 15. 20.

Whether A. be her husband or not. 2 Rol. 585. l. 21.

If the issue be, that she was married before her age of consent to B. and afterwards to the demandant, and so his wife, and not the wife of B. 2 Rol. 585. l. 25.

So, marriage or not; for the marriage in fact, and not the legality of the marriage is in question. R. 2 Rol. 585. l. 50. 2 Cro. 102.

So in a personal action, if the issue be, whether lawfully married; for the marriage is the substance of the issue, and lawfully ought not to have been added. R. 1 Lev. 41.

So, if a matter of spiritual cognizance concerns persons dead, or strangers to the action; as, if the bastardy of B. be alleged, who is dead, or a stranger. Vide Bastard, (D 2.)

So, if *ne unques accouple*, profession, &c. be alleged between strangers. 2 Rol. 584. l. 51. 585. l. 37. 40.

If a clerk be dead, when the issue is, whether he was able or not. 2 Rol. 583. l. 42.

So, if a matter of spiritual cognizance is coupled and entangled with a matter of temporal cognizance, it shall be tried by the country; as, special bastardy. Vide in Bastard, (D 2.)

Marriage within age of consent, and afterwards a dissent, and so not his wife, shall be tried by the country. 2 Rol. 585. l. 25.

So by the st. 12 Car. 2. 33. bastardy or marriage according to an ordinance of parliament after 1 May 1642, before 1660.

So, if the issue be, prior or not prior, it shall be tried by the country. 2 Rol. 584. l. 21.

Avoidance of a church, &c. by being a bishop in Ireland. Pal. 459.

So, parson or not, upon special matter. 2 Rol. 585. l. 30.

So, *infra sacros ordines*, where it relates to avoidance of a church by the act of uniformity. D. 2 Lev. 250.

So, if there be issue upon institution and induction. 2 Rol. 584. l. 7. 585. l. 30.

Whether a church be void or not. 2 Rol. 584. l. 1. 588. l. 32.

Whether void by resignation. 2 Rol. 783. l. 47.

If issue be, whether excommunicated after a prohibition, it shall be tried by the country. 2 Rol. 585. l. 45.

Whether professed before a feoffment; for the question is upon the time. 2 Rol. 588. l. 20.

So in the case of infancy, a matter of spiritual cognizance shall be tried by the country; as, bastardy alleged in him. 2 Rol. 586. l. 40. Vide Bastard, (D 2.)

A divorce for pre-contract of his father and mother, in an assize by him. 2 Rol. 586. l. 37.

So, where it is pleaded only in abatement. Vide in Bastard, (D 2.)

As, if profession or coverture be pleaded in abatement. 2 Rol. 588. S.

So where a matter of spiritual cognizance comes in question in a collateral action. 2 Rol. 585. l. 40. 50. 586. l. 25. Hob. 179. Vide supra, where it is not directly in issue.

So if the bishop return, that the party is exempted out of his jurisdiction, it shall be tried by the country; as, profession, where the bishop returns, that he is exempted. 2 Rol. 587. l. 2.

So, if the power of the bishop to make a certificate be taken away by act of parliament. Semb. Hard. 65.

(A 3.) By whom the certificate shall be. — If the bishop be a party.

So, if the bishop be a party to the suit, the trial shall not be by his certificate; as, in a real action against a bishop, if he plead that the demandant is a bastard, it shall not be tried by himself, but by the metropolitan. 2 Rol. 587. l. 45.

So in a *quare impedit*, where the bishop appears to be the disturber; if the issue be triable by the ordinary, a writ goes to the metropolitan. Dy. 353. b.

As, if a bishop alleged refusal, because the clerk was *inhabilis*. 2 Rol. 587. l. 25. Dy. 327. b.

So, if the issue be, whether the bishop be consecrated, it shall be tried by the metropolitan. 2 Rol. 590. l. 10.

So, if the archbishop of York be party, it shall be by the archbishop of Canterbury. 2 Rol. 589. l. 30. 40. Dy. 328. a.

But if the bishop is not the disturber, a writ to certify may be directed to him; as in a *quare impedit*, where the bishop claims nothing, but as ordinary. 2 Rol. 587. l. 30.

Yet if the bishop is a party, though he is not the disturber, the writ may be to him, or to the metropolitan, at election. R. 2 Rol. 587. l. 40. 1 Rol. 364. 398.

So, if he be the disturber, the writ may be to him, at the election of the party. Semb. 1 Rol. 364. 397.

(A 4.) If the see be vacant.

If there should be a writ to the metropolitan, and the see become void, the certificate shall be by the guardian of the spiritualties. 2 Rol. 587. l. 50.

And the writ shall be to the guardian of the spiritualties, *sede vacante*. 2 Rol. 589. l. 3. 5. Dy. 77. a.

And if any one by composition be guardian of the spiritualties, it shall be directed to him. 2 Rol. 588. l. 53.

So in the vacancy of a bishopric, it shall be directed to the guardian of the spiritualties of the bishop. 2 Rol. 590. l. 25. Dy. 350. a.

Though the see of the bishop or archbishop become vacant after issue or judgment, and before the writ awarded. 2 Rol. 590. l. 30.

So by custom, the writ shall be to the archdeacon of Chester, as immediate ordinary, for all things within the county of Chester. 2 Rol. 588. l. 45.

And to the archdeacon of Richmond, for all things within 2 Rol. 588. l. 48.

So excommunication may be certified by the delegates. 2 Rol. 590. l. 15. R. Dy. 371. b.

But generally the writ shall be directed to the bishop, though he be absent out of the realm. 2 Rol. 589. l. 10.

Though his vicar in his absence refuse the writ. 2 Rol. 589. l. 15.

Though the temporalties are seized into the king's hands. 2 Rol. 590. l. 20.

Though the bishop be only elected, and not consecrated. 2 Rol. 590. l. 5.

Yet

Yet if the king by his writ certify the absence of the bishop, before the writ awarded, or before the return of it, the writ shall be directed to the bishop, or his vicar general. 2 Rol. 589. l. 20. 25.

If the writ be directed to the guardian of the spiritualties, and before execution a bishop is created, there shall be a new writ to him. 2 Rol. 590. l. 35. Dy. 350. a.

(A 5.) Upon what foundation, and at what time.

None can write to the bishop to make a certificate, except the king's courts. Co. L. 134. a. 2 Rol. 589. l. 50.

As B. R. or C. B. Co. L. 134. a. 2 Rol. 589. l. 50.

The justices of gaol-delivery. Co. L. 134. a. 2 Rol. 589. l. 50.

But the courts of London, Norwich, York, &c. cannot write to the ordinary. 2 Rol. 589. l. 50.

And therefore, if a plea be there of a matter triable by the certificate of the ordinary, after issue joined, there shall be a mittimus to remove it in B. &c.; and after a writ to the bishop, and a certificate upon it, there shall be a *procedendo*. 2 Rol. 589. l. 50.

A certificate by the bishop of bastardy, &c. is of no avail, except upon the king's writ to him directed.

And the writ shall always be to the bishop, not to his commissary, &c. R. 1 Leo. 205.

If there be a writ to the bishop to certify bastardy, &c. and afterwards the assize discontinues by the justices not coming, and a re-attachment is sued, the bishop may afterwards make a certificate without a new writ. 2 Rol. 590. l. 50.

(A 6.) How it shall be made.

The certificate of the ordinary must be positive and express. Vide Bastard, (D 2.) — Pleader, (2 Y 10).

The certificate of the bishop shall be conclusive; for no averment lies against it. R. 1 Leo. 205.

But an action upon the case lies for a false certificate, as for a false return. Semb. 1 Leo. 205.

Vide Excommengement, (B 2, &c.)

(B) Trial by certificate of the recorder of London.

If issue be joined, whether there be such a custom of London, it shall be tried by the mayor and aldermen, by the mouth of the recorder. 2 Rol. 579. l. 10. 580. l. 5. to 25. 35. 40. 2 Inst. 126. Confirmed by charter 2 Ed. 4. (c)

And the recorder may make his certificate *ore tenus*. Cro. Car. 361. 516. (d)

Though the custom to be tried does not concern lands, or a devise of them, but a collateral thing. R. 2 Rol. 579. l. 35. Cro. Car. 517. Jon. 412.

(c) And the recorder appears in the purple cloth robe, faced with black velvet; not his scarlet gown, his black silk one, nor the common bar gown. 1 Burr. 251.

(d) And afterwards deliver in the writ with a written copy of the return. 1 Burr. 249. Though

Though it be in an action by *qui tam*, &c. which concerns the king. R. 2 Rol. 579. l. 30.

And upon such issue, there shall be a surmise by the plaintiff, that it ought to be certified by the recorder. 2 Rol. 581. l. 5. Cro. Car. 516. (e)

But if there be a custom for the profit of the city, it shall be tried by the country, and not by the mouth of the recorder; as, whether there be a custom, that every freeman shall be quit of payment, &c. R. 2 Rol. 579. l. 15. Hob. 86.

That such a thing shall be forfeited to the mayor, citizens, and commonalty, &c. R. 2 Rol. 581. l. 10.

So if the custom is not directly in issue, it shall be tried by the country; as, if a custom be alleged for a market in London every day in the week, &c. and the issue is, that there is no such market. R. 2 Rol. 580. l. 30. Hob. 87.

(C) Trial by certificate of the marshal, etc.

If upon a distringas for escuage, the issue be, whether the tenant was in Scotland with the king for 40 days, it shall be tried by the certificate of the marshal of the king's host under his seal. 2 Rol. 583. l. 30. Lit. sect. 102.

So, if issue be, whether a man outlawed was in prison at Bourdeaux at the time of the outlawry, it shall be tried by the certificate of the mayor of Bourdeaux. Co. L. 74. a. (f)

Certificate of assize. Vide ASSIZE, (B 27, 28.)

Bankrupt's certificate. Vide BANKRUPT, (D 37.)

Vide ENQUEST, (A 2, 3.) — STATUTE STAPLE, (D 2.)

CERTIORARI.

(A 1.) When it lies. p. 332.

(A 2.) When a mittimus thereupon. p. 334.

(B) How a certiorari shall be prosecuted. p. 335.

(C) How it shall be returned. p. 337.

(D) When a certiorari does not lie. p. 338.

(E) When it shall be a supersedeas. p. 340.

(F) When not. p. 341.

(e) But if the recorder has once certified a custom as part of the customs of London, the court must take notice of it, and it cannot be certified again. Doug. 380.

(f) So, if a serjeant be arrested for a less debt than is allowed by the annual mutiny act, the certificate of the secretary at war may, on motion to discharge him, be read in evidence to shew the nature of his duty. 1 Bl. 29.

(G) Pro-

(G) *Procedendo*. p. 341.

(H 1.) *Supersedeas to process*. p. 341.

(H 2.) When it shall be granted. p. 342.

(A 1.) *When it lies*.

The writ of *certiorari* is an original writ issuing out of the chancery, or B. R. when the king would be certified of any record in any other court of record. F. N. B. 245. A.

Or the king may command the tenor of the record at his election. F. N. B. 245. B.

So, if *nul tiel record* be pleaded in C. B. the court may award a *certiorari*. 1 Rol. 394. l. 15. Hob. 135. R. Cro. Car. 297. (g)

And therefore the king may command the justices of C. B. to certify him of any record before them in his chancery. F. N. B. 244.

Or to send all records depending in C. B. before the justices in eyre to be determined by them. F. N. B. 243. K.

And if the justices in eyre cannot determine during their stay in the same county, they shall be removed by *certiorari* into C. B. again. F. N. B. 243. K.

So a *certiorari* lies (h) to the chief justice of B. R. to certify a condemnation there for the king's fine or other record, to the intent to have a pardon, &c. F. N. B. 245. G. 246. C.

(g) 1. So, if *nul tiel record* in C. B. of a recovery there be pleaded in B. R. and issue joined thereon, a *certiorari* is the proper method, and must necessarily issue. 2 Burr. 1034. — 2. And if a *certiorari* issues to use the record as evidence, then the tenor, if returned, is sufficient, and countervails the plea of *nul tiel record*; but if the record is to be proceeded upon, the record itself must be removed, and this, whether it is before judgment or after; and in this case, the writ must be superseded, and not quashed, which can only be done on a view of the record itself. 2 Atk. 517.

(h) 1. Where a statute takes away the *certiorari* to remove an indictment, the crown is not included in the restriction, unless it appears to have been the intention of the legislature; therefore, the prosecutor of an indictment for keeping a disorderly house may remove it, notwithstanding the general words of the stat. 25 Geo. 2. c. 56. s. 10. 5 T. R. 626. — 2. And a provision in a statute that "no *certiorari* shall issue to remove any proceeding to be had or taken in pursuance of this act," does not extend to proceedings under the act had by a court without jurisdiction. 5 T. R. 629. — 3. If a statute gives an appeal to the sessions from a conviction by a magistrate, but takes away the *certiorari* to remove either conviction or order of sessions thereon, and a subsequent statute gives additional powers to the sessions as touching the infliction of punishment, without taking away the *certiorari*, the clause in the former act cannot be extended to proceedings of the sessions under this, so that they are removeable by *certiorari*; but the proceedings before the convicting magistrate, being under the former act, remain irremoveable as before. 2 T. R. 735. — 4. A *certiorari* will not lie to remove the assessments made by the commissioners of land-tax; since, being of a public nature, every one may have a copy. 2 T. R. 234. — 5. The stat. 13 Geo. 2. c. 18. s. 5. enacts, that "no *certiorari* shall be granted to remove any judgment, order, or other proceedings before justices, unless (such *certiorari* be applied for within six calendar months next after such order, &c. and unless) the party suing forth the same hath given six days notice thereof, in writing, to the justices," &c. The notice must be given before moving for a *certiorari*. 5 T. R. 279. 281. — 6. The stat. does not apply to the removal of an indictment. 1 East, 298. — 7. A *certiorari* lies to remove a presentment in a court leet; and when removed, the presentment is traversable in B. R. Cowp. 458.

So there may be a *certiorari* to justices of assize, to certify a record before them into chancery. F. N. B. 244. C.

Or to remove all proceedings before them, before the new justices of assize. F. N. B. 242. D. 243. C. D.

Or before other justices, to the intent to have an attain. F. N. B. 242. E. (i)

So to justices in eyre to remove a record or proceedings before them. F. N. B. 242. E. 243. K. 1 Sid. 296.

So, if a record be removed into the exchequer, there may be a *certiorari* to the treasurer and chamberlains of the exchequer. F. N. B. 242. F. G. 243. A. 246. O.

So a *certiorari* lies to the treasurer and barons to certify the debt of B. or his ancestor to the king, without saying, into B. R. or into chancery. F. N. B. 246. G.

So a *certiorari* lies to the justices of gaol-delivery. F. N. B. 246. A. H.

So a *certiorari* lies to the justices of oyer and terminer to certify a record into B. R. in order to have execution upon it. F. N. B. 246. B.

So after conviction, in order to have judgment. 1 Sal. 149. Mod. Ca. 17.

To the mayor and sheriffs of London, to remove a record before them to be determined in B. R. F. N. B. 245. E. 246. L.

To the steward and marshal of the king's house. F. N. B. 246. F. K.

To justices of peace, to remove an indictment before them. Mod. Ca. 17. (k)

Or to them, to remove an outlawry, and process transmitted to them. F. N. B. 246. I.

So it lies to justices of the peace, to remove any order made by them. R. 3 Mod. 95. (l)

(i) 1. *Certiorari* to the justices of assize, shall be granted to the crown or prosecutor, without special reason alleged; *secus* to the defendant. Andr. 27. — 2. It lies to remove an information before justices of assize, against a parson for non-residence, for they have no jurisdiction in the cause. Ibid.

(k) 1. To remove an indictment for not doing statute labour in the highway. Str. 849. — 2. To remove an indictment at sessions against private persons for not repairing a bridge. Str. 900. 6 T. R. 194. — 3. To the quarter sessions of a corporation to remove an indictment, on affidavit that defendant could not have a fair trial. Ld. Rd. 1452.

(l) 1. To the sessions, to remove an order of two justices. Str. 470. — 2. To remove order of justices before appeal, where only one party has a right to appeal, for he may waive it; or where no time is limited for appealing, for then a *certiorari* might never lie; but where two parties have a right to appeal, and the time of appealing is fixed, there it shall not be granted till after appeal, or after the time for it. Andr. 343. — 3. One *certiorari* lies to remove several orders and convictions, if they relate to the same persons and the same matter. Ibid. — 4. It lies from B. R. to all inferior courts, though the statute giving jurisdiction say that the sentence shall be final, and without appeal, for the jurisdiction of B. R. cannot be taken away without *express* words. 2 Bur. 1042. 1 Bl. Rep. 235. — 5. Therefore it lies to remove orders made on the conventicle act 22 Car. 2. c. 1. even *after* appeal to the quarter sessions, trial by jury, verdict and judgment, notwithstanding the 6th and 13th sections, the first of which says, that no other court whatsoever shall intermeddle with any cause or causes of appeal on this act, but that they shall be finally determined in the quarter-sessions only; and the latter enacts, that the act shall be interpreted most beneficially for suppressing conventicles; for the *certiorari* does not go to try the *merits*, but to see whether the limited jurisdiction has exceeded its bounds or not. Ibid.

Or to a particular justice of peace, for a conviction, or order by him.

So to commissioners of sewers, for all orders, or proceedings before them. F. N. B. 247. A. 1 Sal. 145. Vide Sewers, (I 1.) (m)

To a bishop to certify admission, institution, and induction to a church. F. N. B. 246. M.

To an escheator. F. N. B. 247. H.

To the *custos brevium* of C. B. to certify a writ original, or judicial. F. N. B. 246. N.

To the mayor of the staple, to certify a statute before him. F. N. B. 244. D. Vide Statute Staple, (D 2.)

To a sheriff, for the record of a redisseisin, or post-disseisin before him. F. N. B. 242. B.

And that, to the intent to have execution out of B. R. F. N. B. 242. B. (n)

To sheriff and coroners, to certify an outlawry in the county. F. N. B. 245. G.

So it lies to the mayor, bailiffs, or other judge of a court in a city or town, to remove a record into B. R. to have execution there. F. N. B. 243. B.

So to the censors of the college of physicians, to remove a judgment by them for malpractice. R. 1 Sal. 144.

So to every inferior jurisdiction of record. 1 Sal. 144.

Though it be within a county palatine, or in Wales, &c. R. 1 Sal. 146. 148. R. 2 Rol. 29. Vide Franchises, (D 1, &c.) (o)

Or the cinque ports 2 Lev. 86. Vide Franchises, (E 1 &c.) (p)
Vide Pleader, (3 K 7.)

(A 2.) When a mittimus thereupon.

After a record removed by *certiorari* to the chancery out of C. B. or other court, it may by mittimus be transmitted to B. R. F. N. B. 244. A. B.

Or when removed by *certiorari* from the justices of assize, or other justices to the chancery, it may be transmitted to C. B. F. N. B. 244. C.

So a record, removed by *certiorari* to another court, or justices, may afterwards be transmitted to B. R. or other justices at the king's election. F. N. B. 245. F.

Or it may be removed by *certiorari* to B. R. immediately, without a mittimus. R. 1 Lev. 312.

But if there be a material variance between the *certiorari* and the order, &c. the record shall not be removed thereby: as if there be a

(m) 1. To commissioners of sewers, for their order to remove their clerk, it is of common right; but in other cases, where danger of inundation may be, it is discretionary. Str. 609. — 2. On the clerk of commissioners of sewers being removed, and another appointed, B. R. will not, on the rule to shew cause, suffer them to make out their titles by affidavits, but will grant *certiorari*. Fort. 374.

(n) It lies to remove inquisition taken by the sheriff under a private act of parliament, and the verdict and judgment thereon. 4 Burr. 2244.

(o) 1. To remove indictment from quarter sessions in Wales, without stopping at the grand sessions. 4 Burr. 2456. — 2. To the grand sessions in Wales, on an indictment for misdemeanor. Str. 704. B. R. H. 163.

(p) Or to Berwick, or to any other dominions of the king or crown. 2 Burr. 856.
certiorari

certiorari for an order concerning foreign salt, and the order is for salt, generally. R. 1 Sal. 145.

If it be for an indictment only, and the indictment and conviction also are returned. 1 Sal. 150.

If the indictment be after the *certiorari* granted. 1 Sid. 317.

If a record be removed by *certiorari* after conviction in another court, the party must waive the issue, and it shall be tried *de novo*; otherwise B. R. will not give judgment upon a conviction in another court. R. Carth. (q)

(B) How a *certiorari* shall be prosecuted.

By the st. 1 & 2 Ph. & M. 13. a *certiorari* to remove a prisoner out of gaol, or a recognizance shall be (r) signed by the chief justice, or in his absence by the other justices of the court whence it issues, on pain of 5*l.* against the prosecutor.

By the st. 5 & 6 W. & M. 11. no *certiorari* shall be granted to remove an indictment for a trespass, or a misdemeanor, from the quarter-sessions in term, but on a rule (s) in B. R. on motion of council in open court, nor in vacation, but on allowance of a judge, who shall indorse his name, and the name of him who demands it.

In vacation there must be a fiat signed by a judge for a *certiorari* for orders of justices. 1 Sal. 150.

And the fiat and the writ also must be signed by a judge in a *certiorari* for an indictment. 1 Sal. 150.

And a fiat after the essoign day of the term, for a *certiorari*, which was tested in the preceding term, will be irregular. R. 1 Sal. 150.

So by the st. 21 Jac. 8. a *certiorari* to remove an indictment of riot, forcible entry, or assault and battery, from the quarter-sessions, shall be delivered in open court, and not allowed unless the indicted be bound in sureties in 10*l.* to the prosecutor, to pay costs, which the justices in the quarter-sessions shall assess, within a month after conviction.

So by the st. 13 & 14 Car. 2. 6. it shall not be allowed to remove proceedings about highways, unless bound, &c. in 40*l.* to pay costs to be ascertained upon oath. (t)

Nor by the st. 5 & 6 W. & M. 11. to remove an indictment for a trespass or misdemeanor before trial, unless bound, &c. in a recognizance of 20*l.* before justices of peace (or by the st. 8 & 9 W. 3. 33.

(g) The recognizance of a receiver of an infant's estate in Ireland cannot be transmitted to the Exchequer in Ireland by *nihilimus*, but a bill must be filed there, and the certificate of the recognizance here will be evidence. Bumb. 249.

(r) After a record has been returned on a *certiorari*, no objection can be taken that the writ was misdirected. 4 T. R. 499.

(s) 1. A *certiorari* is granted to the crown as of course; to a defendant only upon grounds disclosed by affidavit. 2 T. R. 89. — 2. The affidavits for a *certiorari* shall be entitled by the name of the cause in the court below. Str. 704. — 3. A *certiorari* to remove an indictment against an excise officer and others, from the sessions, was granted, on the motion of the attorney-general, for the defendant, without any affidavit. 4 T. R. 161.

(t) *Certiorari pro rege* lies in case of highways, though no affidavit nor recognizance; for the st. 13 & 14 C. 2. c. 6. 3 W. & M. and 5 W. & M. c. 11. relate only to *certiorari*'s applied for by defendants. Str. 1209.

before a judge of B. R.) to appear, plead, and try it the next assizes, or if in London or Middlesex, the next term, or sitting after term.

And if he be convicted, B. R. shall give costs (*u*), and upon oath of refusal for ten days after demand, send an attachment.

And if bail be not found before a judge since the st. 8 & 9 W. 3. 33. a *certiorari* ought not to be allowed. 1 Sal. 149.

So by the st. 3 & 4 W. & M. 10. s. 6. there shall be no *certiorari* to remove a conviction or proceeding on that act, against destroying deer, unless bound by recognizance with sureties, as the justices of peace before whom he is convicted shall approve, in 50*l.* conditioned to pay the prosecutor his full costs to be ascertained by oath.

So by rule in B. R. Mich. 3 W. & M. on a *certiorari* to remove any indictment, or presentment from any county or corporation, except London or Middlesex, the prosecutor at the return shall procure two men to give a recognizance before a judge of the court to plead, and if issue be joined, to try it on notice to the prosecutor or his clerk at the next assizes, and in default thereof before the end of the term a *procedendo* shall go. Sho. 336.

So by the st. 5 Geo. 15. no *certiorari* shall be to remove a conviction for deer-stealing, till security to pay the forfeiture as well as costs, and render the party to justice in a month after the conviction confirmed.

But a recognizance is not forfeited for not trying, unless the prosecutor gives a rule for it. 1 Sal. 370.

If the sureties are worth as much as the statute requires, the justices of peace cannot refuse them as insufficient. R. Mar. 27.

If a recognizance be given upon a *certiorari* for costs; the prosecutor shall have only costs upon the writ, and after it. R. 1 Sal. 55. (*x*)

(*u*) 1. The stat. 5 & 6 W. & M. c. 11. as to defendant's paying costs to prosecutor, extend only to officers and persons really injured; therefore defendant indicted for an attempt to commit felony, where no damage is done to the prosecutor, shall not pay costs. 1 Wils. 139. 1 Burr. 451. 2 T. R. 47. — 2. But it is sufficient if prosecutor is proved to be a civil officer (as by affidavit) though it is not indorsed on the indictment. 1 B. M. 54. — 3. If, on removing indictment from sessions of oyer and terminer, defendant enters into recognizance of 50*l.* to plead, go to trial, and appear on the return of the verdict, this is not a recognizance on stat. 5 & 6 W. & M. c. 11. but at common law, and defendant shall not pay costs. Str. 1165. 1 B. M. 10.

(*x*) 1. So by 13 G. 2. c. 18. s. 6. no *certiorari* shall be granted to remove any conviction, judgment, order, or other proceeding before any justice of peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless application be made for it within six calendar months after such conviction, &c. and unless it be proved on oath that the party applying for the same hath given six days notice in writing to the justice or justices, or to two of them, (if so many there be,) before whom such conviction, &c. was had, that such justice, &c. may shew cause against the issuing of the *certiorari*. Vide 1 Wils. 35. — 2. The six days notice required by this statute before any application for a *certiorari* to remove proceedings by justices of the peace must be given before making the motion for a rule to shew cause why such *certiorari* should not be granted. 5 T. R. 279. — 3. On *certiorari* to remove indictment for perjury, if defendant makes up the record, carries it down to sittings with a *distringas*, and attorney-general's warrant for a tales, there being special jury, and eleven only appear, and the warrant is given prosecutor's counsel, and they will not pray a tales, and defendant does not, and cause is made, *remanet pro defectu jurator.*, defendant shall not pay costs. Str. 937. — 4. If prosecutor has obtained a third part of the fine, it shall be deducted out of the costs taxed on the recognizance. 4 Burr. 2125.

And the prosecutor, after the costs paid, ought not to move for an aggravation of the fine. R. 1 Sal. 55. (y)

If a recognizance be taken for 40*l.* not for 20*l.* as a statute speaks, it will be a good recognizance, though no *superseas*. R. Sal. 56*+*.

If he who sues a *certiorari*, does not appear in court within the term when the writ is returned, he shall forfeit his recognizance. Mod. Ca. 220.

If upon a *certiorari* the party gives a recognizance, and does not prosecute with effect, viz. does not quash or traverse the indictment, an attachment lies against him. R. Mar. Pl. 118. (z)

(C) How it shall be returned.

A *certiorari* shall be returned (a) by the justices, to whom it is directed, with the record (b), &c. annexed, not by the clerk of the peace. R. Sal. 479.

By a rule in B. R. Mich. 3 W. & M. it shall be returned the first return of the next term. Sho. 336.

Justices of peace must return, though bail be not found according to the stat. D. 1 Sid. 70.

Justices of peace ought to return all indictments against him who procures it, found before the return, though not indicted at the time of the awarding of the writ, or delivery to the officer. R. 1 Rol. 395. l. 30.

If it be for indictments against six named in the writ, if four of them only are indicted, the indictments shall be removed. R. 1 Rol. 395. l. 35.

The names of the indictors ought to be returned upon every indictment removed. St. P. C. 71. a.

(y) 1. On indictment on 5 Eliz. c. 4. for exercising a trade, &c. removed by defendant after conviction, he may, on motion, pay the penalty without costs, and have his recognizance discharged. 1 B. M. 431. — 2. If A. convicts B. on the game laws before a justice, and he pays the penalty, and then A. brings action for the same offence, the justice refuses copy of conviction, and B. brings *certiorari* merely to have the conviction to plead; A. gets it affirmed, and then becomes nonsuited in the action: the court will not give costs on the *certiorari*, but order the bond to be delivered up. 3 B. M. 1720.

(z) 1. If defendant, convicted on penal statute, brings *certiorari*, and dies before argument, the court will go on. Str. 937. — 2. If no proceedings in two or three terms, order shall be affirmed. B. R. H. 206. — 3. If defendant has paid costs for not going on to trial, prosecutor shall not quash, but on payment of costs. Str. 946. — 4. If the prosecutor enlarges the rule to shew cause why an order should not be quashed, he shall not afterwards object to the issuing the *certiorari*. 2 B. M. 745. — 5. Proceedings being removed from inferior court of record, where parties were at issue, plaintiff must declare *de novo*. Barnes, 345. — 6. When a conviction is removed by *certiorari*, no motion can be made in arrest of judgment, unless the defendant appear in person. 1 Black. Rep. 209. — 7. And if defendant remove an indictment by *certiorari* without good cause, he cannot be admitted *in forma pauperis*. 1 Black. Rep. 230.

(a) The return must be on parchment; if on paper, it shall be quashed. B. R. H. 173.

(b) A *certiorari*, being directed to the *custos brevium* of C. B. to return original, he shall return the original, and not that there is such original in his office, but not filed, because plaintiff had entered *ne recipiatur*; if otherwise, B. R. wil commit him. Str. 63.

If there be a *certiorari* for a conviction, &c. it must be drawn in form; for a return of affidavits and warrants is not sufficient. 1 Sal. 146.

So if the return be, *tenor cujus ordinis sequitur*; for it ought to say, *qui quidem ordo*, &c. 1 Sal. 147.

So if there be a return of a transcript, the record itself is removed. Sal. 565.

But if a *certiorari* be for indictments, in which A. B. and C. are indicted; an indictment against A. alone, or against A. and B. shall not be returned. 1 Sal. 146. 151.

If for an order of settlement at N. M. an order which settles at N. only shall not be returned. R. Sal. 452.

So in some cases, the return may be in English; as, in orders by justices, &c. 1 Sal. 149.

If the justices do not make a return, an *alias* and *pluries* go, and if they do not return the *pluries*, *vel causam*, an attachment goes. F. N. B. 245. A.

But justices of peace need not subscribe their names; for *responsio justiciariorum domine regine*, is sufficient. Mod. Ca. 43.

So a *certiorari* to remove an order of discharge of an apprentice, need not return the discharge itself under the hands and seals of the four justices; for it is sufficient to say, that there was an order under their hands and seals. R. Sal. 470. (c)

(D) When a certiorari does not lie.

But a *certiorari* lies only for the tenor of a record, when the court, to which the record by the *certiorari* is removed, has no jurisdiction to hold plea upon the record: as if to an information for recusancy in C. B. it be pleaded, that he is a recusant convict before justices of peace, and upon *nul tiel record* a *certiorari* goes to the justices of peace, the tenor only of the conviction shall be returned; for C. B. cannot hold plea upon the conviction, if it should be removed. R. 1 Rol. 395. l. 50. Hob. 135.

So if a judgment in an inferior court be pleaded; upon *nul tiel record* pleaded, if a *certiorari* goes, only the tenor of the record shall be certified. Dy. 187. a.

So by charter, the city of London certifies only the tenor of the record. 1 Sid. 155. 230.

By the st. 22 Car. 2. 12. it does not lie to remove indictments for repair of causeys, highways, or bridges before judgment. But now by the st. 5 & 6 W. & M. 11. it shall be allowed, upon an affidavit that the right of repair is in question.

So by the st. 7 & 8 W. 3. 6. no *certiorari* shall remove or supersede

(c) 1. If a *certiorari* is directed to the *custos brevium* of C. B. to certify an original in London, and he returns there is none in the city of London, it is good; for the court will take notice that London is a city, it being mentioned to be so in several acts of parliament. Str. 309. — 2. If, in a return it is said, that a man took a lease for seven years, the court will presume it was by deed. Str. 555. — 3. Upon a *certiorari* to remove a conviction by a justice of the peace on the deer act (16 Geo. 3. c. 30.) a return that the record is returned to the sessions, and that a copy is annexed to the writ, is sufficient. 2 T. R. 285.

the proceedings or judgment on that act, unless the title of the titles, &c. come in question. (*d*)

So it shall not be granted, to remove a commitment for felony, till an indictment found. 1 Vent. 63. (*c*)

So a certiorari shall not be granted, to remove an indictment from the Old Bailey, or any justices of gaol-delivery, without special cause. 1 Sal. 144. 150. 151. (*f*)

And if the cause afterwards appears to be false, a *procedendo* shall go. 1 Sal. 144.

So it shall not be granted to remove a conviction of recusancy, in not taking the oaths, &c. for thereby the conviction would be made ineffectual. R. 1 Sal. 145. (*g*)

Nor, for an order of justices, upon which an appeal lies, before an appeal, or the time for an appeal elapsed. 1 Sal. 147.

Yet if no objection is made till the return filed, it will be too late. 1 Sal. 147. (*h*)

So it shall not be granted regularly, after a conviction upon an indictment, before judgment. 1 Sal. 149. Mod. Ca. 17. 61. (*i*)

And if granted before conviction, and not served till after, or jury sworn, it shall be quashed. Mod. Ca. 61. (*k*)

So

(*d*) 1. So no *certiorari* lies on the statute 30 Geo. 2. c. 24. against obtaining money. &c. by false pretences, for by s. 20. it is expressly taken away. Vide Cowp. 24. 2 T. R. 472. — 2. The 20th section of this stat. that “no *certiorari* shall be granted to remove any indictment, conviction, or other proceedings had thereon, in pursuance of this act,” refers to the whole act. 2 T. R. 472.

(*c*) 1. It does not lie to remove an indictment for felony from the general sessions of oyer and terminer at Hicks’s Hall, without consent of the prosecutor. Cowp. 283. — 2. It does not lie to remove a conviction by the commissioners of excise for the double duties on beer under the 12 Car. 2. c. 24. s. 35. for by the general words of 6 Geo. 1. c. 21. s. 22. it is taken away in all cases of forfeiture under the excise laws previous to that act. Doug. 549. — 3. But that act does not extend to take away the *certiorari* in cases arising under subsequent acts, as in the case of a conviction by justices on the statute of 11 Geo. 1. c. 30. s. 16. Id. 555. n.

(*f*) 1. Str. 583. B. R. H. 569. — 2. *Certiorari* granted to the Old Bailey, to remove indictment for forgery, defendant being of good repute, and prosecution on slight grounds. Str. 549. — 3. *Certiorari* refused to a colonel indicted for perjury. And the court declared they must make no distinction of persons, and that they cannot grant a *certiorari* without consent of the prosecutor. Str. 717. — 4. The court will grant *certiorari* to remove indictment of perjury from the Old Bailey, if defendant has twice paid costs for not going on to trial, the judges being gone. Str. 1019. — 5. Or, if prosecutor’s attorney is under-sheriff of Middlesex, and attended the grand jury on finding the bill. Str. 1068.

(*g*) 1. It does not lie, to remove a poor’s rate itself. Str. 955. 975. 2 T. R. 235. — 2. Nor, on an order on 7 & 8 W. 3. c. 29. for the parish at large to repair the highways, in aid of the inship. 6 G. 2. Str. 944. — 3. Nor to remove the assessments of the land tax, on account of the public inconvenience. But if an information be moved for against the commissioners of the land tax, the court will admit an attested copy of the assessment as evidence, instead of the original. 2 T. R. 235.

(*h*) 1. Nor on an appointment of overseers, after an appeal lodged till the sessions have made a determination. Str. 991. — 2. But on appointment of overseers before appeal, it lies. Ibid. — 3. And if on appeal from a poor’s rate, sessions order books to be produced at an adjourned day, *certiorari* lies to remove that order, notwithstanding the appeal. Ibid. — 4. To the quarter sessions, to fetch up any proceedings but their orders; as their refusal of a certificate of the loss of malt burnt after duty paid. Str. 391.

(*i*) 1. Nor after appeal to the sessions, pending such appeal. 2 T. R. 196. — 2. A verdict cannot be removed from sessions, before judgment; and *certiorari*, if granted, shall be quashed. Str. 1227.

(*k*) 1. The court quashed a *certiorari*, which was issued before, but not served until after

So it is not usually granted to remove an indictment for forgery, perjury, or other great offence. 1 Sid. 54. (*l*)

Or a presentment before justices in eyre, before conviction. 1 Sid. 296.

Nor to a new jurisdiction erected by statute, which has a final authority; if it proceeds according to the statute. 1 Sid. 296.

Nor usually to a county palatine. 2 Bul. 158. (*m*)

So it shall not be granted to remove a record in which the king is concerned, without the consent of the attorney-general. R. Hard. 409. Sti. 295. (*n*)

And it seems to be in the discretion of the court, to grant it, or not. Sti. 126. 211. (*o*)

(E) When it shall be a *supersedeas*.

If a *certiorari* be delivered to a justice of peace, or other justice to whom it is directed, it shall be a *supersedeas*, and every proceeding afterwards is a contempt. R. Yel. 32. 1 Sal. 148. (*p*)

And every proceeding afterwards is void. Per Keble. Attorney-General, Cont. 6 H. 7. 16. R. Mar. 27.

And error lies for it. R. 1 Sal. 148.

If it be delivered to one justice only, it shall be a *supersedeas* to all. Yel. 32.

Though the party does not sue for a removal of the record. Yel. 32.

Though the indictment be after the teste of the *certiorari*. Yel. 32. R. 1 Sal. 149.

So if several are indicted, and one of them only brings a *certiorari*, it shall be a *supersedeas* to all of them. Dub. Mar. 112.

So if one only tenders a surety according to the statute, and the others refuse. R. Mar. 27.

So a *certiorari* shall be a *supersedeas* to the justices, though delivered after the return passed. Yel. 32. R. Dy. 245.

When a *certiorari* is granted, the party may have a *supersedeas* out of chancery to the sheriff. F. N. B. 237. E.

after judgment on an indictment for a misdemeanor. 7 T. R. 373. — 2. After judgment, the record can be removed only by writ of error. Ibid. — 3. Before *certiorari* issues to remove order for quaker's tithes, it ought to be determined whether the title is really in question or not. 1 B. M. 485. — 4. If *certiorari* has issued, and the return filed, yet, if it appears that the title is not really in question, the court will order it to be superseded, *quia improvide*, and the return taken off the file. Ibid. — 5. So if it issues, where it is taken away by act of parliament, (though order of sessions refers it to the court by consent of parties,) *supersedeas quia improvide*. 4 Burr. 2522.

(*l*) If an attorney is indicted at the assizes for a forgery, in altering a fault in a writ under seal, the court will not grant *certiorari*. Str. 877. 1202.

(*m*) 1. It cannot be sued out as of course, and without laying a special ground before the court, to remove proceedings in an action in the courts of the counties palatine. Doug. 749. — 2. Nor to remove such proceedings in the courts of great sessions of Wales. Id. 751. n.

(*n*) It lies not to remove ejectment from mayor's court, but *hab. corp.* and plaintiff declares *de novo*. In replevin it lies, and parties do not begin *de novo*. Barnes, 421.

(*o*) And where an appeal lies, the court will not grant a *certiorari*, if the objection be not to the jurisdiction but to the merits, although it be otherwise competent for them to grant it. Doug. 555.

(*p*) A *certiorari* removes all proceedings of the nature described therein, which have taken place between the teste and return, though the proceedings originated after the teste. 1 East, 298. And all proceedings subsequent to notice of the *certiorari* given to the officer to whom, &c. sitting in his judicial capacity, are void. Ibid.

So

So the justices of peace ought to award a *supersedeas* to the sheriff *ex officio*. Qu. F. N. B. 237. E.

(F) When not.

But a *certiorari* will not be a *supersedeas*, if no sureties are found, when required by statute. Mod. Ca. 33. 43.

Or if the party does not try the indictment afterwards, according to the condition of the recognizance given. Mod. Ca. 43.

So a *certiorari* delivered after the jury are impannelled, and sworn, will not be a *supersedeas* to the taking of the verdict. R. 1 Sal. 144.

Or after a warrant for execution executed by distress, the officer may proceed in the execution. R. 1 Sal. 147.

So after a *certiorari* for an inquisition for a forcible detainer, if there be a new forcible detainer, the justices may record the force, though they cannot make restitution. 1 Sal. 151.

So a *certiorari* in chancery to remove the tenor of a record, will be no *supersedeas*. Semb. Skin. 419.

(G) *Procedendo*.

After a *certiorari* returned and filed in B. R. no *procedendo* goes. Mod. Ca. 33. 43. Semb. 1 Sal. 145. — D. cont. where the cause suggested for the *certiorari* appears false. 1 Sal. 144. (g)

(H 1.) *Supersedeas to process*.

So after a *supersedeas* to any process, all subsequent proceedings are void.

As after an *habeas corpora juratorum*, if a *supersedeas* be delivered to the sheriff, for staying the return of the writ, and he afterwards return it at the assizes, and the trial is had, and judgment upon it; it will be error. R. 2 Cro. 43.

(g) 1. If defendant is convicted on confession, and then prosecute or brings *certiorari*, defendant shall have *procedendo*. 2 B. M. 749. — 2. If an indictment for felony has been removed into B. R. from an inferior court, in order to issue process of outlawry upon it, and the party accused come in, B. R. will award a *procedendo* to carry the record back. 5 T. R. 478. — 3. If a defendant, who has been convicted on an indictment in an inferior court, remove the record by *certiorari* into B. R. between verdict and judgment, with a view of making objections to the indictment in arrest of judgment, the court will send the record back by *procedendo*, without going into the objections to the indictment. 2 Ld. Rd. 937. 6 T. R. 145. — 4. If the party wish to take the opinion of the court on the sufficiency of the indictment, he should remove the record by writ of error after judgment below. Ibid. — 5. If after a *procedendo* to carry back a cause to an inferior court, the plaintiff recover and then sue out a *scire facias* against the bail below, and they remove the proceeding against them into B. R. by *habeas corpus*, the court will award a *procedendo* in the suit against the bail. 6 T. R. 365. — 6. A cause was removed from an inferior court by an *habeas corpus cum causa*, to which a return was made, stating a custom under which the defendant was sued and arrested; error was suggested on the face of the proceedings below; the court of B. R. will not stay the *procedendo* merely on that ground, but will leave the defendant to his writ of error. Fitz. 57. 6 T. R. 760. — 7. When *certiorari* is filed there must be a motion to take it off the file, previous to motion for *procedendo*. 4 B. M. 2456. — 8. And it may be superseded *quia improvide emanavit*. 1 Bur. 488, 489.

(H 2.) When it shall be granted.

A *supersedeas* to process shall be granted, when the party finds surety to appear, and answer to the law: as, in term, it shall be granted out of C. B. to a *capias* or exigent, upon surety taken by the sheriff for his appearance at the day. F. N. B. 236. A.

So it shall be granted in the vacation out of chancery, upon surety found there, or to the sheriff. F. N. B. 236. A. Vide in Chancery, (4 Q.)

If the sheriff, &c. do not cease upon a *supersedeas* delivered to him, an *alias*, *pluries*, and attachment go against him. F. N. B. 236. C. 239. A. 240. B.

But a *supersedeas*, in respect of privilege to be sued in another court, shall not be allowed, after he has acknowledged the jurisdiction of the court: as, after an imparlance. R. 9 Ed. 4. 53. b.

Nor a *supersedeas* to an exigent *quia improvide*; for that recites an appearance. R. Dy. 33. b.

Certiorari bill. Vide CHANCERY, (2 O 1.)

CESSAVIT.

(A) When it lies.

By the st. of Glocester, 6 Ed. 1. 4. if a man lease land to farm, or to find estovers, &c. to a fourth part of the value, and he who holds the land lets it lie fresh, so that a distress cannot be found for two years: after the two years the lessor may have an action to demand the land in demesne, by a writ which he shall have out of chancery: and if, before judgment, the arrearages and damages are rendered, and surety found to render thereafter, he shall retain his land, &c.

This was the first statute which gave a *cessavit*. 2 Inst. 295.

By the st. W. 2. 13 Ed. 1. 21. *concordatum est eodem modo, si quis delineat domino suo servitium debitum, et consuetum per biennium.*

A writ of *cessavit* lies in the *per*, *cui*, and *post*. Vide F. N. B. 208. H.

CESSION.

(Vide ESGLISE, N 1.)

CESTUY QUE TRUST.

Vide CHANCERY, (4 S. 3, 4. — 4 W 32.)

CESTUY QUE USE.

Vide USES, (I).

CHAIRMAN of a Committee.

Vide PARLIAMENT, (E 7.)

CHALLENGE.

CHALLENGE.

(A) Trial by jury.

- (A 1.) The antiquity of it. p. 313.
- (A 2.) The number of jurors. p. 313.
- (A 3.) The qualification. p. 313.
- (A 4.) Who are exempted. 313.

(B) Challenge to the array. p. 314.

(C) Challenge to the polls.

- (C 1.) Peremptory. p. 314.
- (C 2.) For cause. p. 315.

(A) Trial by jury.

(A 1.) The antiquity of it.— Vide Enquest.

Trial by a jury was before the conquest.

(A 2.) The number of jurors.

The usual number of jurors is 12, for the trial of a cause.

But in an attain, except where the issue is upon a collateral point, there ought to be 24. 2 Rol. 673. l. 50.

In a grand assise 16. viz. 4 knights and 12 others; so 20, or 12 only. 2 Rol. 674. l. 5.

In inquests of office there may be more, or less than 12. As in an inquiry of waste. R. 2 Rol. 673. l. 53. Cro Car. 414. F. N. B. 107. C.

(A 3.) The qualification.

Jurors must be *probi et legales homines*. Vide post (C 2.)

By the st. *articuli super chartas*, 28 Ed. 1. 9. the sheriff shall put in juries such as be next neighbours, the most sufficient and least suspicious, on pain of double damages.

And by the st. 34 Ed. 3. 4. the next people not suspected, nor procured.

(A 4.) Who are exempted.

But by the st. West. 2. 13 Ed. 1. 38, *senes ultra 70 annos, perpetuo languidi, vel tempore summonitionis infirmi, vel in patria non commorantes, non ponantur in juratis, aut assisis*.

And if these are returned, though it is not a cause of challenge, they may have an action against the sheriff, without notice of the age, sickness,

ness, or non-commorancy; but it is more usual to have a writ *de non ponendis in assisis*. 2 Inst. 447. Reg. 179. b.

And if the sheriff does not obey, an attachment. Reg. 181. a. (r)

(B) Challenge to the array.

There may be a challenge to the array, if there be a default, or partiality in the sheriff. Co. L. 156.

It will be a principal challenge, if the sheriff does not return a knight upon the pannel, where a peer appears upon the record to be plaintiff, or defendant. Co. L. 156. 2 Rol. 636. l. 53. 2 Mod. 182.

Though others join with the peer in the action. Co. L. 156. (s)

So, if the sheriff does not return a knight upon the pannel in an attaint. Co. L. 156.

For more concerning challenge to the array, principal and for favour. Vide Co. L. 156, &c. (t)

(C) Challenge to the polls.

(C 1.) Peremptory.

In high treason, the defendant by the common law, and now by the st. 1 & 2 Ph. & M. 10. (which repeals the st. 33 H. 8. 23. to the con-

(r) 1. So, peers of the realm shall not be sworn on juries. F. N. B. 166. a. — 2. So, persons privileged by charters of exemption, shall not be returned, and the affirmative acts of parliament relative to jurors and juries shall not be construed to take away such privilege. Doug. 191. — 3. Yet by st. 5 H. 3. c. 14. they who have charters of exemption from being impannelled in juries, &c. shall nevertheless be sworn where justice cannot be administered without them, saving their liberty at other times. — 4. So, clergymen as such are exempted, yet if they have lay-fees they may be impannelled on account of them, unless they be in the service of the king, or of some bishop. F. N. B. 166. b. Dougl. 190. — 5. So, coroners, verderors, foresters, and other officers of the forest. Id. 167. a. Doug. 190. — 6. So officers of the army. Doug. 190. — 7. So, tenants in ancient demesne shall not be bound to serve on juries out of their own manor. Ibid. — 8. So physicians are exempted. 3 Bl. Com. 564. — 9. So, by st. 32 H. 8. c. 42. members of the united company of surgeons and barbers; but since the separation of these by st. 18 G. 2. c. 18. the barbers seem not entitled to this privilege. — 10. So, barristers, attornies, and other officers of the courts are exempted. 3 Bl. Com. 564. — 11. Officers on the cheque-roll, as gentlemen pensioners, &c. have an ancient privilege, not to be sworn on juries. B. R. H. 202.

(s) 1. A knight need not be returned on the panel in ejectment, on the demise of a peer. Str. 1023. — 2. By st. 24 G. 2. c. 18. challenge to the panel for want of a knight, when a peer is party, is taken away.

(t) 1. After entering into the common rule for a special jury, if one of the parties strikes out hundredors, and at the trial challenges the array for want of hundredors; it is a contempt, and attachment shall issue. Id. Ray. 1564. Str. 593. — 2. But if the defendant in an information obtain rule for special jury, though prosecutor takes the *venue* to the sheriff, the defendant may challenge the array, if the sheriff has an interest in the cause, and it shall not be contempt. Str. 1000. — 3. The party to whom the sheriff is related cannot challenge the array for that reason. Semb. But if he does, and there is a demurrer *instantur* to that challenge, and before it is determined, the other party, for the sake of expedition, moves to quash the array, the court will do it without the consent of the party challenging. Andr. 85. 104. — 4. In an action on a bye-law, that none but freemen shall keep in a city, it is good challenge that the sheriff is a freeman. 3 B. M. 1847. — 5. It is a good cause of challenge if the jury is returned by an under-sheriff, who is attorney in the cause. Cowp 112.

trary)

trary) may challenge 35 of the jury peremptorily, without cause shewn. Cg. L. 156. b.

Though he be outlawed for treason, and the issue be upon a collateral point. Co. L. 157. b.

So, if he at first challenge for cause, and the juror be tried and found indifferent, he may afterwards challenge peremptorily. Co. L. 158. a.

So in petit treason, or felony, by the common law he might challenge 35, which is now restrained by the st. 22 H. 8. to 20, without cause shewn. Co. L. 156.

So, in an appeal. Bendl. Pl. 77. Mo. 12.

So the king by the common law might challenge without cause shewn, when he pleased; but he is now restrained by the st. 33 Edw. 1. Ord. de In. Co. L. 156. b.

And therefore, if he challenge without cause, and others sufficient do not appear, he may shew his cause of challenge. R. Ray. 473, 4. (u)

(C 2.) For cause.

Challenge for cause is principal, or to the favour.

A principal challenge is, first, in respect to his dignity, that he is a peer. Co. L. 156. b.

And if the party do not challenge him, the peer may challenge himself. Co. L. 156. b.

2dly, *Propter defectum*, that he is a villein, or an infant. Co. L. 156. b. 157. a. 2 Rol. 657. l. 10.

That he is an alien. Co. L. 156. b.

But by the st. 27 Ed. 3. 8. an inquest taken before the mayor of the staple, if the parties be strangers, shall be tried by strangers; if denizens, by denizens; if one party be denizen the other alien, one half of the inquest shall be denizens, the other aliens. Vide Alien, (C 8.)

So, by the st. 28 Ed. 3. 13. in all inquests before the mayor of the staple, or other justice between merchants or others, though the king be party, if there be so many aliens or denizens in the place where the trial is, not parties to the matter; if there are not so many aliens, so many as are there, the rest denizens, good men, and not suspicious to either party. Confirmed by the st. 9 H. 6. 29.

And therefore, an alien plaintiff or defendant may pray a *venire per medietatem lingue*, except in a trial for high treason. R. Dy. 144. b.

So an executor or administrator of an alien, though he himself be *indigena*. Dy. 28. a. in marg.

And if a full inquest does not appear, the tales shall be *per medietatem lingue*. R. Poph. 36. Dy. 28. a. in marg.

Yet if an alien be joined in a suit with an Englishman, or sue as executor, or administrator to such an one, he shall not have a *venire per medietatem lingue*. Mo. 557. Cro. El. 275. Dy. 28. a.

And if he does not pray such a *venire*, a challenge for default of aliens is not allowed. Vide Dy. 28. 144. b.

(u) On an issue on a collateral point, to reverse an outlawry, or avoid an act of attainer, or on any inquest of office, the prisoner has no peremptory challenge. 2 Hale, 267. 278. 1 Lev. 62. Str. 824. Foster, 40.

So if the alien does not pray it, the other party may, but he need not. Dy. 28. a. 144.

So if they are returned upon the *venire* as aliens, they cannot be challenged, though they are not so. Dy. 28. a. in marg.

And a trial *per medietatem linguæ*, where it ought not to be, is not good, though by consent; for that shall not alter the law. Dy. 28. a. in marg.

Nor by the st. West. 2. 13 Ed. 1. 38. *ponantur in assisis vel juratis licet in proprio comitatu qui 20s. per annum non habeant, nec extra comitatu qui 40s.*

By the st. *de non ponendis in assisis*, 21 Ed. 1. the sheriff shall not put in recognizances that pass out of the county, any who have not 100s. per annum. And in the county none shall be impannelled to serve before the king's justices on inquests, juries, or other recognizances, who have not 40s. per annum; save that in cyre, cities, boroughs, or towns, where juries pass on matters touching the said cities, &c. it shall be done as before.

By the st. 2 H. 5. 3. st. 2. no person shall be admitted in any inquest on a trial of the death of a man, or in a plea real or personal, where the debt or damages are laid to 40 merks, if he have not lands or tenements of 40s. per annum above reprises, so it be challenged, &c. Vide 35 H. 8. 6.

Nor, by the st. 27 El. 6. if he have not freehold of 4l. per annum, unless in Wales, cities, or towns, &c.

Nor, by the st. 4 & 5 W. & M. 24. (continued by 7 & 8 W. 3. 32. 1 Ann. 13. 10 Ann. 14. & 9 Geo. 8.) if he have not 10l. per annum in his own name, or in trust in England, and 6l. per annum in Wales in the same county, freehold, copyhold, or ancient demesne in fee, tail, or for life of himself or some other, in issues tried before the justices in B. R. C. B. exchequer, assise, nisi prius, oyer and terminer, gaol delivery, or general quarter sessions of the peace, &c.

Provided, that the tales need have but 5l. per annum, and in Wales 3l. and in cities, boroughs, and towns corporate, as formerly used. (x)

And any not having so, may be challenged, and on his oath discharged.

Jurors since the st. 2 H. 5. 3. must have 40s. per annum freehold out of ancient demesne. Co. L. 156. b. 9 H. 7 1. b.

And it is sufficient, if they have it as *cestuy que use*. Co. Lit. 272. a. b.

(x) 1. And by st. 3 G. 2. c. 25. s. 19. the sheriffs of the city of London for the time being, shall not return any person to try any issue joined in B. R., C. B., or Exchequer, or to serve on any jury at the sessions of oyer and terminer, gaol delivery, or sessions of the peace for the city of London, who shall not be a householder within the city, and have lands, tenements, or personal estate to the value of 100l., and the same matter being alleged as cause of challenge, and so found, shall be admitted as a principal challenge, and the person challenged shall be examined on oath of the truth of the said matter. — 2. And by s. 20. sheriffs or other officers to whom the return of jurors belongs for any county, city, or place respectively, shall not return any person to serve on a jury for the trial of a capital offence, who at the time of such return would not be qualified in such respective county, city, or place, to serve as a juror in civil causes for that purpose; and the same matter being taken as cause of challenge, shall be admitted as a principal challenge, and the person challenged shall be examined on oath of the truth of the said matter.

If the debt and damages together amount to 40 merks, it is within the st. 2 H. 5. 3. for it is in equal mischief. R. 9 H. 5. 4. b. Vide Co. L. 272. a.

So in an avowry, where the issue was *hors de son fée*, though the damages are not 40s. R. per Just. de B. R. & C. B. 9 H. 7. 1. b. 16 H. 7. 14 b. 10 H. 6. 8. a.

In an action upon the st. 8 H. 6. 10 H. 7. 14. a.

So by the st. 8 H. 6. 9. none shall be upon inquests to try a forcible entry, or detainer before justices of peace, unless he hath 40s. per annum.

Nor, by the st. 15 H. 6. 5. to try an attain on a verdict to 40*l.* value, who hath not 20*l.* Or by the st. 23 H. 8. 3. 20 merks per annum, or on a verdict to a less value, who hath not 5 merks per annum, or 100*l.* in goods, except in cities, or boroughs, &c.

Nor, by the st. 1 R. 3. 4. upon an inquest in the sheriff's turn, or by the st. 19 H. 7. 13. to try riots or routs before justices of peace, unless he hath 20 s. per annum freehold, or 26s. 8*d.* per annum copyhold.*

Nor, by the st. 11 H. 7. 21. upon a jury in any of the courts in London, except he hath lands or goods to the value of 40 merks, or of 100 merks if the suit be for lands, or for a debt and damages to 40 merks value, or more.

But where the debt and damages do not amount to 40 merks, he shall not be challenged, if he has any freehold. Co. L. 156, 7. Q. Whether he must not have 20s. per annum. 2 H. 7. 13. b.

So before the st. 2 H. 5. 3. in personal actions, where land was not demanded, it was no challenge, that a juror had no freehold; for the st. W. 2. 28. was made for the ease of jurors of small estate only. 17 Ass. 15. Vide Ray. 486. Semb. 10 H. 7. 14. a.

So in an information in the nature of a *quo warranto*, it is no challenge, that a juror has not a freehold; for it is out of 2 H. 5. 3. which provides for a plea between party and party only. R. per 4 J. in B. R. to whom 3 J. in C. B. acc. But a bill of exceptions was filed for it. Ray. 486.

So the exception for cities, &c. in the stat. 15 H. 6. 5. extends to cities, &c. which are counties. R. 12 Ed. 4. 13. a.

So by the st. 11 H. 7. 21. in an attain in London, the challenge shall not be for want of sufficiency of lands or goods in the jury impannelled, the jury being to be returned, by each alderman four, each in substance worth 100*l.* or more. So by the st. 37 H. 8. 5. if each juror be worth 400 marks in goods.

So in a jury for a trial for high treason, a challenge for defect of freehold is not allowed in London; for freehold was not required by the common law, and though the st. 2 H. 5. 3. requires 40s. per annum in an inquest for the death of a man (which seems to be intended in all capital cases), yet by the st. 1 & 2 Ph. & M. the trial in high treason was reduced to the common law. R. per 4 J. in Lord Russel's Case. 3 Trials, 138.

But by the st. 7 W. 3. 3. the trial ought to be by a jury of freeholders. (y)

(y) If a juryman in treason, brought to the book, says he has no freehold in the county, he shall be sworn upon a *voire dire* to that matter, and if he answers, he has none, he shall be set aside. Foster, 7.

So by the st. 4 Geo. 2. 7. in Middlesex, leaseholders having 50*l.* per annum above ground rents, or other reservations, shall be obliged to serve on juries, when summoned. (z)

For more concerning challenge to the polls, principal and for favour, Vide Co. L. 156. b. &c.

CHAMBERLAIN.

High chamberlain. Vide OFFICER, (E 7.)

Chamberlain of Chester. Vide FRANCHISES, (D 5.)

Chamberlains of the exchequer. Vide COURTS, (D 11.)

Chamberlain of London. Vide LONDON, (I.)

CHAMPERTY.

Vide MAINTENANCE, (A 2, 3.)

CHANCELLOR.

Chancellor. Vide CHANCERY, (B 1.) — JUSTICES, (K 8.) — PARLIAMENT, (L 32.) — VISITOR, (A 2.)

Chancellor of the exchequer. Vide COURTS, (D 9.)

CHANCE-MEDLEY.

Vide JUSTICES, (M 19.)

(z) 1. So, by st. 3 G. 2. c. 25. s. 18. any leaseholder for the term of 500 years absolute, or for any term determinable on life or lives, of the clear yearly value of 20*l.* per annum over and above the rent reserved, is qualified to serve on juries. — 2. "That a juror is a freeman," is good cause of challenge in an action on a bye-law, that none but freemen shall keep shop in a city. 3 B. M. 1847.

CHANCERY.

(A) The antiquity of the chancery.

- (A 1.) As to the court of pleas. p. 365.
- (A 2.) As to the court of equity. p. 365.
- (A 3.) It cannot be now erected. p. 365.
- (A 4.) Where held. p. 372.
- (A 5.) Usage and practice of. p. 372.

(B) Officers of the chancery.

- (B 1.) Lord chancellor. p. 372.
- (B 2.) His oath. p. 374.
- (B 3.) And duty. p. 375.
- (B 4.) Master of the rolls. p. 376.
- (B 5.) Masters of chancery. p. 378.
- (B 6.) The register. p. 384.
- (B 7.) The six clerks. p. 385.
- (B 8.) Warden of the fleet. p. 388.
- (B 9.) Other officers. p. 388.

(C) The jurisdiction of the chancery.

- (C 1.) Ordinary, according to the common law. p. 389.
- (C 2.) Extraordinary jurisdiction. — Court of equity. p. 391.

(D) Process.

- (D 1.) *Subpœna*. p. 393.
- (D 2.) Letter to a peer. p. 401.
- (D 3.) Attachment. p. 401.
- (D 4.) Attachment with proclamation. p. 408.
- (D 5.) Commission of rebellion. p. 409.
- (D 6.) Serjeant at arms. p. 410.
- (D 7.) Sequestration. p. 412.
- (D 8.) Injunction.—The force of it. p. 415.
- (D 9.) For staying proceedings at common law. p. 417.
- (D 10.) For cause of privilege. p. 423.
- (D 11.) For staying waste. p. 423.

(D 12.) For

(D 12.) For restraining other acts. p. 424.

(D 13.) For quieting possession. p. 425.

(D 14.) For staying printing, &c. p. 426.

(E) Bill in chancery.

(E 1.) When it shall be filed. p. 426.

(E 2.) The matter of the bill. — Must have proper parties, &c. p. 427.

(F) Bill of revivor. p. 433.

(G) Bill of review. p. 435.

(H) Demurrer.

(H 1.) When it lies, and when not. p. 437.

(H 2.) How put into court, &c. p. 442.

(I) Plea.

(I 1.) What is a good plea, and what not. p. 444.

(I 2.) How put into court, &c. p. 450.

(K) Answer.

(K 1.) When it shall be filed. p. 452.

(K 2.) How it shall be made. p. 453.

(K 3.) Answer by commission. p. 455.

(L) Exceptions.

(L 1.) When delivered, &c. p. 456.

(M) Cause heard upon bill and answer. p. 459.

(N) Replication. p. 460.

(O) Rejoinder. p. 461.

(P) Examination of witnesses.

(P 1.) By the examiner. p. 462.

(P 2.) By commission. p. 462.

(P 3.) Commission ex parte. p. 464.

(P 4.) New Commission. p. 465.

(P 5.) Interrogatories. p. 465.

(P 6.) The manner of examination. p. 466.

(P 7.) What witnesses shall be examined. p. 467.

(P 8.) Depositions. p. 468.

(Q) Publication. p. 469.

(R) Examination in perpetuam rei memoriam. p. 471.

(S) Cause set down for hearing. p. 472.

(T) Hearing

(T) Hearing of the cause.

- (T 1.) When the defendant does not appear. p. 473.
- (T 2.) When the plaintiff does not appear. p. 474.
- (T 3.) When there are not parties. p. 474.
- (T 4.) What evidence shall be admitted upon the hearing.—Depositions in the same, or a cross cause. p. 475.
- (T 5.) In another cause. p. 478.
- (T 6.) The defendant's answer. p. 479.
- (T 7.) Deeds. p. 479.

(V) Interlocutory orders. p. 481.

(W 1.) Reference to a master. p. 482.

- (W. 2.) Report. p. 482.
- (W 3.) Exceptions to the report. p. 488.
- (W 4.) Final reference. p. 485.

(X) Trial by common law. p. 485.

(Y 1.) Decree. p. 486.

- (Y 2.) Who are bound by a decree. p. 488.
- (Y 3.) Who not. p. 488.
- (Y 4.) Execution of a decree. p. 489.
- (Y 5.) Rehearing. p. 490.
- (Y 6.) Decree enforced by an original bill. p. 491.
- (Y. 7.) Or avoided. p. 492.

(Z) Accident. p. 492.

(2 A) Account.

- (2 A 1.) When it shall be decreed. p. 493.
- (2 A 2.) When not. p. 495.
- (2 A 3.) Account stated. p. 497.
- [(2 A 4.) The manner of the account. p. 499.]
- (2 A 4.) What allowance an accountant shall have, and what not. p. 499.
- (2 A 5.) For what he shall not be charged. p. 501.
- (2 A 6.) For what he shall be charged. p. 502.
- (2 A 7.) When bound by an account with another. p. 503.
- (2 A 8.) When not. p. 503.

(2 B) Administrator.

- (2 B 1.) When he shall have relief. p. 504.
- (2 B 2.) When there shall be relief against him. p. 504.

(2 C) Agreement.

(2 C) Agreement.

- (2 C 1.) When decreed.—Upon articles for the assurance of lands. p. 505.
- (2 C 2.) Against whom it shall be decreed. p. 507.
- (2 C 3.) When upon a parol agreement, and when not. p. 508.
- (2 C 4.) Since the st. 29. Car. 2. 3. p. 510.
- (2 C 5.) Decreed, though not equal. p. 513.
- (2 C 6.) Though founded upon mistake. p. 513.
- (2 C 7.) Though the consideration was remote. p. 513.
- (2 C 8.) But an agreement shall not be decreed. — If made without a consideration. p. 514.
- (2 C 9.) If it be unreasonable. p. 514.
- (2 C 10.) Or void in law. p. 515.
- (2 C 11.) Or discharged afterwards. p. 515.
- (2 C 12.) Or obtained indirectly. p. 516.
- (2 C 13.) Or made without proper parties. p. 516.
- (2 C 14.) Or not mutual. p. 517.
- (2 C 15.) So failure of one party excuses the other. p. 517.
- (2 C 16.) Specific performance in the discretion of the court. p. 517.
- (2 C 17.) In what manner an agreement shall be decreed to be executed. p. 519.

(2 D) Alimony.

- (2 D 1.) When it shall be decreed. p. 521.
- (2 D 2.) When not. p. 522.
- (2 D 3.) When in the ecclesiastical court. p. 522.

(2 E) Apportionment. p. 523.**(2 F) Appointment.**

- (2 F 1.) What sufficient to charge land. p. 523.
- (2 F 2.) What appointment to the person is sufficient. p. 524.
- (2 F 3.) When it shall be defeated. p. 525.

(2 G) Assets.

- (2 G 1.) What shall be. p. 526.
- (2 G 2.) What not. p. 530.
- (2 G 3.) Bill for discovery of assets. p. 531.
- (2 G 4.) If the assets are exhausted by a debt upon security, shall come in aid. p. 532.

(H) Assign-

(2 H) Assignment ; what shall be a good one. p. 533.

(2 I) Average. p. 535.

(2 K) Award.

(2 K 1.) When it shall be confirmed. p. 537.

(2 K 2.) When it shall be avoided.—If it be unreasonable. p. 538.

(2 K 3.) Or made without assent of parties. p. 538.

(2 K 4.) If made only for part. p. 539.

(2 K 5.) If it be repugnant. p. 539.

(2 K 6.) If made by corruption or partiality. p. 539.

(2 L) Bankrupts. [Vide in tit. Bankrupt].

(2 L 1.) When chancery aids. p. 540.

(2 L 2.) When not. p. 541.

(2 M) Baron and feme.

(2 M 1.) Suit by them. p. 541.

(2 M 2.) Suit against them. p. 542.

(2 M 3.) What they shall be compelled to do. p. 542.

(2 M 4.) What not. p. 543.

(2 M 5.) Act of the husband, when it binds the wife. p. 543.

(2 M 6.) When not. p. 544.

(2 M 7.) When the husband shall be bound by the act of the wife. p. 545.

(2 M 8.) When not. p. 546.

(2 M 9.) Trust for a wife ; when it enures to the husband. p. 547.

(2 M 10.) When the husband shall be aided for the portion of his wife. p. 549.

(2 M 11.) When the wife shall be aided against the act of her husband. p. 549.

(2 M 12.) Provision for a wife. — How expounded. p. 551.

(2 M 13.) When barred. p. 553.

(2 M 14.) Disposition by a wife. p. 554.

(2 M 15.) When the husband is in exile. p. 555.

(2 M 16.) When the covenant of an husband and wife shall be enforced, though void. p. 555.

(2 N) Charitable uses.

(2 N 1.) Relief by original bill. p. 555.

(2 N 2.) Though the gift be void by law. p. 556.

- (2 N 3.) Where the land, &c. given is improved. p. 557.
- (2 N 4.) How charitable uses shall be decreed.—According to the intent of the donor. p. 558.
- (2 N 5.) Circumstances shall be regulated. p. 559.
- (2 N 6.) Where the use may be improved. p. 559.
- (2 N 7.) The improvement of the estate distributed. p. 560.

(2 O 1.) *Certiorari* bill. p. 560.

(2 O 2.) Bill by way of appeal. p. 561.

(2 P) *Common*. p. 561.

(2 Q) *Condition*.

- (2 Q 1.) How construed. p. 562.
- (2 Q 2.) Breach of a condition.—When aided, if the intent be performed. p. 562.
- (2 Q 3.) When it shall be relieved. p. 563.
- (2 Q 4.) If a compensation can be made. p. 563.
- (2 Q 5.) If the breach was procured by fraud. p. 564.
- (2 Q 6.) If the condition was in *terrorem*. p. 564.
- (2 Q 7.) If it was broken only in circumstances; or became impossible by the act of God. p. 566.
- (2 Q 8.) When it shall not be relieved.—Where the condition is precedent. p. 567.
- (2 Q 9.) Where recompence cannot be made. p. 568.
- (2 Q 10.) If the relief is not prayed in convenient time. p. 568.

(2 R) *Confirmation*. p. 568.

(2 S) *Contribution*. p. 568.

(2 T) *Conveyance*.

- (2 T 1.) When aided.—When there is a mistake in the deed. p. 569.
- (2 T 2.) When part of the land is omitted in the deed. p. 569.
- (2 T 3.) When more is inserted than was intended. p. 569.
- (2 T 4.) When the conveyance is lost. p. 570.
- (2 T 5.) When the conveyance is defective. p. 570.
- (2 T 6.) Or mistaken. p. 570.
- (2 T 7.) If it is aided, it shall be in the same plight, as it would have been, if it had been right *in initio*. p. 571.
- (2 T 8.) When a conveyance shall not be aided. p. 571.
- (2 T 9.) If

- (2 T 9.) If it be voluntary. p. 571.
- (2 T 10.) Or against him, who has an estate upon good consideration. p. 572.
- (2 T 11.) When a conveyance shall be avoided. p. 572.
- (2 T 12.) When not.—Though made upon a false suggestion. p. 574.
- (2 T 13.) Though it becomes unreasonable by matter *ex post facto*. p. 574.
- (2 T 14.) When a surprise or a small mistake is alleged. p. 575.
- (2 T 15.) After a long acquiescence. p. 575.
- (2 T 16.) At the request of him who has only a voluntary conveyance. p. 575.

(2 V) **T**oppohold. p. 575.

(2 W) **C**osts; when they shall be given, and when not. p. 580.

(2 X) **C**ovenant.

- (2 X 1.) When it shall be performed. p. 586.
- (2 X 2.) When not. p. 587.
- (2 X 3.) When it shall be avoided.—If there was a mistake. p. 587.
- (2 X 4.) If it was intended for a special purpose. p. 588.
- (2 X 5.) If it was satisfied by collateral matter. p. 588.
- (2 X 6.) When there is a remedy upon a covenant in equity. p. 588.

(2 Y) **C**ustom. p. 589.

(2 Z) **D**ebt. **W**hat makes a man a debtor in equity. p. 589.

(3 A) **D**evise.

- (3 A 1.) When it shall be decreed, though void by law. p. 589.
- (3 A 2.) When chancery does not relieve; and when a devise may be explained by witnesses. *vid.* (T 4.) p. 591.
- (3 A 3.) How it shall be construed. — Devise for payment of debts and legacies. p. 593.
- (3 A 4.) In what order they shall be paid. p. 598.
- (3 A 5.) The surplus shall be to the heir. p. 600.
- [(3 A 6.) When the land shall be sold.—*Vide post*, (4 H 5.)] p. 600.
- (3 A 7.) Who shall sell. p. 602.
- (3 A 8.) How expounded, where the words are ambiguous. p. 603.

(3 B) Discovery.

(3 B 1.) When a bill lies for a discovery. p. 607.

(3 B 2.) When not. p. 609.

(3 C) Dismes; when tithes shall be decreed in chancery. p. 611.

(3 D) Distribution of intestates estates.

(3 D 1.) By the st. 22 & 23 Car. 2. p. 613.

(3 D 2.) Who shall be excluded from a share upon a distribution. p. 613.

(3 D 3.) By custom. p. 614.

(3 E) Dower.

(3 E 1.) Wife favoured by equity. p. 614.

(3 E 2.) Dower, when aided, and when not. p. 616.

(3 F) Equity.

(3 F 1.) Relief when allowed in equity.— In cases of fraud, accident, and trust. p. 618.

(3 F 2.) Where the transaction is done *malâ fide*. p. 619.

(3 F 3.) When not.— If a man will not do equity. p. 620.

(3 F 4.) If his actions are wrongful. p. 621.

(3 F 5.) Though a man's expectation is frustrated. p. 622.

(3 F 6.) Nor when a reasonable benefit has accrued to another by law. p. 622.

(3 F 7.) Not against a statute. p. 622.

(3 F 8.) Or a maxim at law. p. 623.

(3 F 9.) Not where the plaintiff has the same relief by law. p. 623.

(3 G) Executor.

(3 G 1.) Stands in the place of the testator. p. 626.

(3 G 2.) What things he is compellable to do in equity. p. 626.

(3 G 3.) How he shall pay legacies.—When a legatee shall refund, and when not. p. 629.

(3 G 4.) What is an assent to a legacy; vide Administration (C 5, &c.) p. 630.

(3 G 5.) When he shall take as a legatee. p. 630.

(3 G 6.) What payment will be safe. — By direction of the court. p. 631.

(3 G 7.) When he shall be a residuary legatee. p. 631.

(3 G 8.) What

(3 G 8.) What relief an executor shall have in equity.
p. 635.

(3 G 9.) What not. p. 636.

(3 H) **Exchange.** p. 636.

(3 I) **Fait.**

(3 I 1.) When a discovery shall be enforced. p. 636.

(3 I 2.) When a deed shall be aided or avoided. p. 637.

(3 I 3.) When a deed shall be produced. p. 637.

(3 K) **Fines.** p. 638.

(3 L) **Forfeiture; when it shall be aided, and when not.** p. 638.

(3 M) **Fraud.**

(3 M 1.) When it shall avoid a bargain. p. 639.

(3 M 2.) Or conveyance. p. 640.

(3 M 3.) Though the bargain or settlement was to take effect upon a contingency. p. 641.

(3 M 4.) Or was transacted by an agent. p. 642.

(3 M 5.) So a voluntary settlement will be fraudulent as to creditors. p. 642.

(3 M 6.) But fraud shall not be presumed. p. 643.

(3 M 7.) A party to the fraud shall not be relieved.
p. 643.

(3 N) **Fine and recovery.**

(3 N 1.) Avoided for fraud, &c. p. 643.

(3 N 2.) Aided, when defective. p. 644.

(3 O) **Guardian.**

(3 O 1.) How he shall account. p. 645.

(3 O 2.) How he shall manage the estate of the infant.
p. 645.

(3 O 3.) How directed by the court. p. 646.

(3 O 4.) When he shall be removed. p. 648.

(3 O 5.) When not. p. 648.

(3 O 6.) When payment to a guardian is allowed.
p. 648.

(3 O 7.) The power of a guardian. p. 649.

(3 P) **Heir.**

(3 P 1.) When subject to the debts of the ancestor.
p. 649.

(3 P 2.) When not. p. 650.

- (3 P 3.) What advantages an heir shall have, and what not. p. 650.
- (3 Q) **Idiot.** p. 657.
- (3 R) **Infant.**
- (3 R 1.) How he shall sue. p. 659.
 - (3 R 2.) How he shall be sued. p. 659.
 - (3 R 3.) What things he shall be decreed to do during his infancy.—To perform a trust. p. 660.
 - (3 R 4.) To do his duty. p. 661.
 - (3 R 5.) Or a thing for his advantage. p. 661.
 - (3 R 6.) Maintenance of infants. p. 662.
- (3 S) **Interest for money.**
- (3 S 1.) At what time it commences. p. 663.
 - (3 S 2.) No interest beyond the penalty. p. 665.
 - (3 S 3.) Nor interest upon interest. p. 665.
 - (3 S 4.) When interest shall not be allowed. p. 666.
 - (3 S 5.) When it shall be allowed. p. 667.
 - (3 S 6.) When a payment shall be intended for interest. p. 670.
- (3 T) **Interpleader ; (bill of).** p. 670.
- (3 V) **Joint-tenants.**
- (3 V 1.) Who shall join in a suit. p. 671.
 - (3 V 2.) Who shall be joined. p. 671.
 - (3 V 3.) Who shall take jointly. p. 671.
 - (3 V 4.) Who, as tenants in common. p. 672.
 - (3 V 5.) What will make a severance of the jointure. p. 673.
 - (3 V 6.) What remedy one joint-tenant, &c. shall have against his companion. p. 674.
 - (3 V 7.) When the act of one binds his companion. p. 674.
 - (3 V 8.) What not. p. 675.
 - (3 V 9.) When an act by one of them binds him after he survives. p. 675.
- (3 W) **Judgment.** p. 675.
- (3 X) **Jurisdiction; when chancery shall have it in cases out of the kingdom, &c.** p. 676.
- Jury.** p. 676.
- (3 Y) **Legacy.**
- (3 Y 1.) When words in a will are expounded otherwise than they are in a deed. p. 678.
- (3 Y 2.) A

- (3 Y 2.) A devisee shall have the same advantage as an heir. p. 678.
- (3 Y 3.) How a legacy shall be recovered in equity. p. 679.
- (3 Y 4.) What shall be a legacy. p. 679.
- (3 Y 5.) Of what thing void. p. 680.
- (3 Y 6.) How a legacy shall be paid. p. 680.
- (3 Y 7.) How a devise shall be construed. p. 682.
- (3 Y 8.) When a devise gives a present interest. p. 692.
- (3 Y 9.) When a legacy carries interest. p. 696.
- (3 Y 10.) When construed *cumulative*, see *infra* (4 P.) p. 697.
- (3 Y 11.) When not. p. 700.
- (3 Y 12.) When a legacy shall be controuled by a subsequent clause, or provision, and when not. p. 702.
- (3 Y 13.) When a legacy shall be lapsed. p. 702.
- (3 Y 14.) When not. p. 703.
- (3 Y 15.) When it merges in the land. p. 705.
- (3 Y 16.) When it shall have relation to the time of making the will. p. 706.
- (3 Y 17.) Or, to the death of the testator. p. 707.
- (3 Y 18.) When legatees shall abate. p. 707.
- (3 Y 19.) When not. p. 709.

(3 Z) Marriage settlement.

- (3 Z 1.) When it shall be enforced. p. 710.
- (3 Z 2.) When not. p. 712.
- (3 Z 3.) To what charges subject. p. 714.
- (3 Z 4.) Provision for portions. p. 714.
- (3 Z 5.) Restraint of marriage.—When the husband shall make a settlement for the portion. p. 720.
- (3 Z 6.) When not. p. 721.
- (3 Z 7.) When the wife shall lose her portion. p. 722.
- (3 Z 8.) When marriage brokage shall be avoided. p. 723.
- (3 Z 9.) What shall be done if the marriage is void or disappointed. p. 724.
- (3 Z 10.) Or, the portion is not all paid. p. 724.
- (3 Z 11.) When a marriage settlement shall pursue the articles strictly. p. 725.
- (3 Z 12.) When it shall pursue the intent of the articles. p. 725.

(4 A) Mortgage.

- (4 A 1.) The nature of it. p. 726.
- (4 A 2.) What shall be said to be a mortgage. p. 726.
- (4 A 3.) What not. p. 727.
- (4 A 4.) Who may redeem. p. 728.
- (4 A 5.) At what time. p. 730.
- (4 A 6.) Upon what terms one may redeem. p. 731.
- (4 A 7.) When a mortgage shall not be redeemed. p. 735.
- (4 A 8.) Assignment of a mortgage. p. 735.
- (4 A 9.) A mortgage belongs to the executor, or administrator of the mortgagee. p. 736.
- (4 A 10.) Prior incumbrance. p. 737.
- (4 A 11.) Foreclosure of a mortgage. p. 741.
- (4 A 12.) When it shall be annulled. p. 743.

(4 B) De creat regnum. p. 743.**(4 C) Notice.**

- (4 C 1.) How regarded. p. 745.
- (4 C 2.) What shall be notice. p. 746.
- (4 C 3.) *Lis pendens*; when it shall be notice. p. 747.
- (4 C 4.) When not. p. 748.
- (4 C 5.) When notice to one affects another. p. 748.
- (4 C 6.) When not. p. 749.
- (4 C 7.) When notice does not prejudice. p. 749.

(4 D) Obligation.

- (4 D 1.) Shall be cancelled.—Being satisfied. p. 750.
- (4 D 2.) After forfeiture. p. 750.
- (4 D 3.) Or, relieved against.—If the obligation be obtained by fraud. p. 751.
- (4 D 4.) If the consideration be not performed. p. 752.
- (4 D 5.) If the consideration be illegal. p. 752.
- (4 D 6.) Obligation by surety. p. 754.
- (4 D 7.) If there was no consideration for it. p. 755.
- (4 D 8.) If there would be a double charge by the obligation. p. 755.
- (4 D 9.) If there be an artful use of strict words. p. 755.
- (4 D 10.) So the obligor shall be relieved.—Where the condition by accident becomes unreasonable. p. 756.
- (4 D 11.) Or is satisfied by other means. p. 756.
- (4 D 12.) If the obligation was given by contrivance, or by force, or terror. p. 757.

(D 13.) So

- (4 D 13.) So the obligee shall be relieved. — If the obligation be lost. p. 757.
- (4 D 14.) If the performance was not effectual. p. 757.
- (4 D 15.) But the obligee shall not be relieved. — If the obligor was a surety, &c. and not chargeable by law. p. 758.
- (4 D 16.) Nor shall he be relieved beyond the penalty of the obligation. p. 758.
- (4 D 17.) An obligation shall be delivered up. — If it be not sued within a reasonable time. p. 759.
- (4 D 18.) If the obligee refuses to perform his part. p. 759.
- (4 D 19.) When there shall be no relief upon an obligation. — If the penalty does not appear excessive. p. 760.
- (4 D 20.) If there was no real satisfaction. p. 760.
- (4 D 21.) If it was *premium pudoris*. p. 760.
- (4 D 22.) If it was voluntarily given, without imposition, or surprise. p. 762.

(4 E) Partition. p. 762.

(4 F) Payment; what shall be. p. 763.

(4 G) Perpetuity.

- (4 G 1.) In chattels personal. p. 764.
- (4 G 2.) In chattels real. p. 767.
- (4 G 3.) In an estate of inheritance. p. 769.
- (4 G 4.) Or freehold. p. 770.
- (4 G 5.) A term that attends an inheritance. p. 770.

(4 H) Power.

- (4 H 1.) When aided; though not pursued. — If it be for payment of debts. p. 771.
- (4 H 2.) For provision for younger children. p. 771.
- (4 H 3.) For the aid of a purchaser. p. 772.
- (4 H 4.) If it be not pursued by reason of fraud, or accident. p. 772.
- (4 H 5.) When the execution of a power shall be made by the court. p. 772.
- (4 H 6.) When a defective execution shall be aided. p. 773.
- (4 H 7.) When it shall not be aided. — If the intent of the power is not pursued. p. 774.
- (4 H 8.) Nor, where it was not the party's purpose to execute his power. p. 775.

(4 H 9.) If

(4 H 9.) If the power was created by a voluntary settlement, and executed voluntarily. p. 775.

(4 I) Purchase.

(4 I 1.) What shall be a purchase. p. 776.

(4 I 2.) Who shall be a purchaser. p. 777.

(4 I 3.) When a purchaser shall be relieved against incumbrances. p. 777.

(4 I 4.) When not. p. 778.

(4 I 5.) When a purchaser may take in prior incumbrances. p. 779.

(4 I 6.) When he ought to discharge prior incumbrances out of the purchase money. p. 779.

(4 I 7.) Incumbrances are to be discharged in proportion. p. 780.

(4 I 8.) The purchaser of a reversion shall not controvert the title of the particular estate. p. 780.

(4 I 9.) What estates are within the consideration of a purchase. p. 780.

(4 I 10.) What not. p. 780.

(4 I 11.) Purchaser without notice. p. 781.

(4 K) Recovery, common.

(4 K 1.) Of what effect it is in equity. p. 781.

(4 K 2.) When a defect of it shall be aided. p. 781.

(4 L) Release.

(4 L 1.) When it shall be avoided.—If it be obtained by fraud. p. 781.

(4 L 2.) Or extends beyond the intent. p. 782.

(4 L 3.) Or obtained with intent to defeat a prior agreement. p. 782.

(4 L 4.) When it shall not be avoided. p. 782.

(4 M) Restitution. p. 783.

(4 N) Rent, [and annuity.]

(4 N 1.) When recovered in equity, though there is no remedy by law. p. 783.

(4 N 2.) Or, the remedy by law is not sufficient. p. 784.

(4 N 3.) When it shall not be recovered in equity. p. 784.

(4 N 4.) Against an assignee. p. 785.

(4 N 5.) When apportioned in equity. p. 785.

(4 N 6.) When an extinguishment prevented. p. 786.

(4 N 7.) When a stranger shall be aided against a distress for rent. p. 786.

(4 N 8.) When rent or other charge upon land shall be extinguished. p. 786.

(4 N 9.) When not. p. 786.

(4 O) Revocation.

(4 O 1.) When good, though all circumstances are not pursued. p. 787.

(4 O 2.) Where prevented by fraud. p. 787.

(4 O 3.) Or accident. p. 787.

(4 O 4.) Or necessity. p. 787.

(4 O 5.) Or default of the party. p. 787.

(4 O 6.) Defective execution of a power of revocation aided. p. 787.

(4 O 7.) When not good.—In aid of a voluntary settlement. p. 788.

(4 O 8.) Who may make a revocation. p. 788.

(4 P) Satisfaction. See supra (3 Y 10.) 789.

(4 Q) Supersedeas ; when granted by chancery. p. 790.

(4 R) Supplicabit. p. 791.

(4 S) Tenant in tail.

(4 S 1.) When his estate is bound by his agreement. p. 791.

(4 S 2.) When his defective conveyance shall be aided. p. 792.

(4 S 3.) Cestuique trust in tail. p. 792.

(4 S 4.) How his estate shall be barred. p. 792.

(4 T) Taxes. p. 793.

(4 V) Trial by common law ; when it shall be directed.
p. 794.

(4 W) Trust.

(4 W 1.) The nature of it. p. 795.

(4 W 2.) Trust of land, what shall be.—Express. p. 796.

(4 W 3.) Implied. p. 796.

(4 W 4.) What not. p. 798.

(4 W 5.) Trust of goods, what shall be. p. 800.

(4 W 6.) Assignment of a trust. p. 802.

(4 W 7.) Removal of a trustee. p. 802.

(4 W 8.) Se-

- (4 W 8.) Security required of him. p. 803.
- (4 W 9.) Trust, how it shall be executed.—Pursuant to the intent. p. 803.
- (4 W 10.) When money shall be decreed in specie. p. 803.
- (4 W 11.) When, at the discretion of the trustee. p. 805.
- (4 W 12.) When equity with a legal interest shall be preferred to mere equity. p. 806.
- (4 W 13.) Trust, how it shall be decreed.—According to the intent of the maker. p. 806.
- (4 W 14.) Trust for payment of debts. p. 809.
- (4 W 15.) A trust shall be decreed to him, who would take, if the settlement were completed. p. 811.
- (4 W 16.) So money for a purchase may be decreed in specie. p. 811.
- (4 W 17.) Trust decreed notwithstanding the statute of limitations. p. 812.
- (4 W 18.) Though the time to perform it be elapsed. p. 812.
- (4 W 19.) Trust of a term for years.—How it may be limited. p. 813.
- (4 W 20.) How it cannot. p. 815.
- (4 W 21.) What estate or interest the grantee of a term takes. p. 816.
- (4 W 22.) Trust to attend the inheritance. p. 817.
- (4 W 23.) To preserve contingent uses. p. 818.
- (4 W 24.) To raise portions. p. 819.
- (4 W 25.) Breach of trust ; how punished. p. 819.
- (4 W 26.) Though the breach be purged as to a stranger. p. 820.
- (4 W 27.) Though the trust-estate lies out of the jurisdiction of the court. p. 820.
- (4 W 28.) *Particeps criminis*. Who shall be. p. 821.
- (4 W 29.) Who not. p. 822.
- (4 W 30.) What shall be a breach of trust ; if the trustee makes a private advantage to himself. p. 823.
- (4 W 31.) What shall not be a breach of trust. p. 824.
- (4 W 32.) If the trustee act with the privity of the cestuique trust. p. 825.
- (4 X) ~~Trust~~. p. 825.

(A) The antiquity of the chancery.

(A 1.) As to the court of pleas.

The court of chancery (a) is an original, and fundamental court (b), as antient as the kingdom itself. Per Hob. 63. (c)

The British and Saxon kings had their chancellors and courts of chancery. 4 Inst. 78. Arg. 1 Ch. R. 5. Argument on jurisdiction of chancery. Wilsint was chancellor to Athelstan. 1 Ch. R. Arg. 5.

The first authentic mention of a chancellor was anno 920, temp. Edw. senioris, qui fecit urketil abbatum Croiland cancellarium suum. Seld. Off. Canc. S. 1. 1 Ch. R. Arg. 5. (d)

And many kings of the Saxon lineage before the conquest had their

(a) 1. Several learned men consider, that the chancery had its name originally from certain bars laid one over another cross-wise like a lattice, wherewith it was environed, to keep off the press of the people, and not to hinder the view of those officers who sat therein; such grates or cross-bars being by the Latins called cancelli. Dugd. 32. Cambden. Cowell. Casiod. ep. 6. l. 11. Pet. Pythæus, l. 2. advers. c. 12. Harr. 1.—2. Others hold, that it has its name of chancery, cancellaria, from the judge who presides here, the lord chancellor or cancellarius; who, sir Edward Coke tells us, is so termed a cancellando, from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction. 4 Inst. 88. 3 Com. 46.—3. But the office and name of chancellor (however derived) was certainly known to the courts of the Roman emperors; where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner; and therefore, when seals came in use, he had always the custody of the king's great seal. 3 Com. 46, 47.

(b) And therefore in pleading any thing done in chancery, the plea does not commence with a prescription as in the inferior courts of equity (for example, the chancery of Chester and of Durham; but a thing done in the Court of Chancery is pleaded as a thing done in the courts of Common Pleas or King's Bench would be pleaded; because they are fundamental courts, as ancient as the kingdom itself, and known to the law; for all kingdoms in their constitutions are with the power of justice, both according to the rule of law and equity, both which being in the king as sovereign, were after settled in several courts. Hob. Rep. 63.

(c) In the 9 Ed. 4., in a suit in the Court of Exchequer against the clerk of the hanger in chancery, upon his account in the exchequer, it was affirmed by all the judges of England, that the Court of Chancery was the King's Court, and had been time out of mind, so that it was impossible to trace its original. Harr. 3. 4 Inst. 78, 79.

(d) 1. In a charter of King Ethelbert, the first christian king of the Saxons, bearing date in 605 of the christian æra, amongst other witnesses thereto, there is Angemundus Referendarius mentioned; where, saith Selden, referendarius may well stand for cancellarius. Harr. 2.—2. The office of both, as the words applied to the court are used in the Code, Novels, and Story of the declining Empire, signified an officer who received petitions and supplications to the king, and made out his writs and mandates, as a custos legis; and though there were divers referendarii, as sometimes thirteen, then eight, then more again, and so divers chancellors in the empire; yet one especially here exercising an office of the nature of those many, might well be styled by either of those names. Ibid.

chancellors.

chancellors. Seld. Off. Canc. S. 1. 4 Inst. 78. — As Edmund, Edred, (e) Edgar, Etheldred, and Alfred. 1 Ch. R. Arg. 5, 6.

Rembald was chancellor to Edward the Confessor; and several are cited before him. 1 Rol. 384. l. 10. Maurice was chancellor to William the Conqueror. 1 Rol. 384. l. 15. 4 Inst. 78. Seld. Off. Chanc. S. 3.

(A 2.) As to the court of equity.

But though the court of chancery, as to the ordinary jurisdiction, which is governed by the rules of the common law, is so antient (for to that the antient authors and the st. 36 Ed. 3. 9. refer), yet the court of equity is of later date, (f) and seems to have its commencement upon the introduction of uses (g): the first decree there was 17 R. 2. which are frequent

(e) Thurkittle was chancellor to King Edred; of whom Ingulphus has this expression: "Cancellarium suum constituit, ut quæcunque negotia temporalia vel spiritualia regis iudicium expectabant, illius consilio et decreto (tam sanctæ fidei et tam profundi ingenii tenebatur, omnia tractarentur) et tractata irrefragabilem sententiam sortirentur." Dugd. 54. Harr. 2.

(f) 1. This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country at any time. 3 Com. 49. — 2. And yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans; the *jus prætorium*, or discretion of the prætor, being distinct from the *leges* or standing laws: "Jam illis promissis," inquit Cicero, "non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? quæ quidem plerumque jure prætorio liberantur, nonnulla legibus." But the power of both centered in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity. 3 Com. 49. — 3. With us too the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require; and when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton (composed under the auspices and in the name of Edward the first, and treating particularly of courts and their several jurisdictions), is there a syllable to be found relating to the equitable jurisdiction of the Court of Chancery. It seems, therefore, probable that when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person, assisted by his privy council (from whence also arose the jurisdiction of the court of requests, which was virtually abolished by the statute 16 Car. 1. c. 10.); and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *aula regia*, but also after its dissolution, in the reign of King Edward I.; and perhaps during its continuance, in that of Henry II. 3 Com. 49, 50.

(g) When, about the end of the reign of King Edward III., uses of land were introduced, and though totally discountenanced by the courts of common law, were considered as fiduciary deposits, and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established; and John Waltham, who was bishop of Salisbury, and chancellor to King Richard II., by a strained interpretation of the statute of Westminster 2. devised the writ of subpœna, returnable in the Court of Chancery only, to make the feeoffee to uses accountable to his cestuique use; which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which therefore the chancellor himself is by statute 17 Richard II. 6. directed to give damages to the parties unjustly

frequent in the time of H. 4. increase in the time of H. 5. & H. 6. under the cardinals Beauford, son of John of Gaunt, and Kemp, and are more numerous in the time of H. 8. under cardinal Wolsey. 2 Inst. 552, 3. 4 Inst. 82, 3.

Yet the court of equity there is said to be as antient as the kingdom. Hob. 63.

And by the st. 14 Ed. 3. Rot. Parl. nu. 33. if nothing be done upon the ordinance then made, it is provided, that the chancellor of England hear the complaint by bill, and proceed as he uses to do in writs of subpœna in chancery. 1 Rol. 372. E.

And Rot. Parl. 45 Ed. 3. nu. 24. the commons pray, that none who proceed there by bill be delayed, as they have been. 1 Rol. 372. l. 25.

And the court of equity seems coeval with the other courts of Westminster. 1 Ch. R. Arg. 10. 12 Co. 114. Eq. Abr. 129.

(A 3.) It cannot now be erected.

The king cannot grant a court of conscience, as *tencre placita*, for a court of pleas is directed by the ordinary rules of law, a court of conscience not, but is uncertain and unlimited, (*h*) and therefore cannot be erected but by act of parliament, or prescription. R. Perrot's Case, 36 [26] El. B. R. 4 Inst. 87. 97. Vide Prerogative, D. 28.

And

unjustly aggrieved. But as the clergy, so early as the reign of King Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro lesione fidei*, as a spiritual offence against conscience, in case of non-payment of debts or any breach of civil contracts, till checked by the constitutions of Clarendon, which declared that "*placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in justitia regis*:" therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new acquired jurisdiction; especially as the spiritual courts continued to grasp at the same authority as before, in suits *pro lesione fidei*, so late as the fifteenth century, till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls, that in the reigns of Henry IV. and V. the commons were repeatedly urgent to have the writ of subpœna entirely suppressed, as being a novelty devised by the subtilty of chancellor Waltham against the form of the common law, whereby no plea could be determined unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry IV. being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute 4 Hen. IV. c. 23. whereby judgments at law are declared irrevocable, unless by attainr or writ of error, yet his son put a negative at once upon their whole application; and in Edward IV.'s time, the process by bill and subpœna was become the daily practice of the court. 3 Com. 51, 52.

(*h*) 1. Equity in its true and genuine meaning, is the soul and spirit of all law: positive law is construed, and rational law is made, by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of equity, and a court of law, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree. 3 Com. 429, 430. — 2. Thus in the first place it is said, that it is the business of a court of equity in England to abate the rigour of the common law. But no such power is contended for. Hard was the case of bond-creditors, whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir: yet a court of equity had no power to interpose. Hard

is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or deviser, although the money was laid out in purchasing the very land; and that the father shall never immediately succeed as heir to the real estate of the son: but a court of equity can give no relief; though in both these instances the artificial reason of the law, arising from feodal principles, has long ago entirely ceased. The like may be observed of the descent of lands to a remote relation of the whole blood, or even their escheat to the lord, in preference to the owner's half-brother; and of the total stop to all justice, by causing the parol to demur, whenever an infant is sued as heir, or is party to a real action. In all such cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian, "*hoc quidem perquam durum est, sed ita lex scripta est.*" 3 Com. 430. — 3. It is said, that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general laws all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity of an act of parliament; and so cases within the letter are frequently out of the equity. Here by equity we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. These then are the cases which, as Grotius says, "*lex non exacte definit, sed arbitrio boni viri permittit;*" in order to find out the true sense and meaning of the lawgiver, from every other topic of construction. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity: the construction must in both be the same: or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter, that sense in a single title. 3 Com. 430, 431. — 4. Again, it hath been said, that fraud, accident, and trust are the proper and peculiar objects of a court of equity. But every kind of fraud is equally cognizable, and equally adverted to, in a court of law: and some frauds are only cognizable there, as frauds in obtaining a devise of lands, which is always sent out of the equity courts to be there determined. Many accidents are also supplied in a court of law: as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies; and many cannot be relieved even in a court of equity; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. A technical trust, indeed, created by the limitation of a second use, was forced into the courts of equity, in the manner formerly mentioned: and this species of trusts, extended by inference and construction, have ever since remained as a kind of *peculium* in those courts. But there are other trusts, which are cognizable in a court of law: as deposits, and all manner of bailments; and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity. 3 Com. 431, 432. — 5. Once more; it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge, founded on the circumstances of every particular case. Whereas the system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus, the refusing a wife her dower in a trust-estate, yet allowing the husband his curtesy: the holding the penalty of a bond to be merely a security for the debt and interest, yet considering it sometimes as the debt itself, so that the interests shall not exceed that penalty: the distinguishing between a mortgage at five *per cent*, with a clause of reduction to four, if the interest be regularly paid, and a mortgage at four *per cent*, with a clause of enlargement to five, if the payment of the interest be deferred: so that the former shall be deemed a conscientious, the latter an unrighteous bargain; all these, and other cases that might be instanced, are plainly rules of positive law; supported only by the reverence that is shewn, and generally very properly shewn, to a series of former determinations; that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances, gives rise to a general rule. 3 Com. 432, 433. — 6. In short, if a court of equity in England did really act, as a

very

very ingenious writer in the other part of the island supposes it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case. No wonder he is so often mistaken. Grotius, or Puffendorf, or any other of the great masters of jurisprudence, would have been as little able to discover, by their own light, the system of a court of equity in England, as the system of a court of law. Especially as the notions before mentioned of the character, power, and practice of a court of equity, were formerly adopted and propagated (though not with approbation of the thing) by our principal antiquarians and lawyers, Spelman, Coke, Lambard, and Selden, and even the great Bacon himself. But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves, partly from their ignorance of law (being frequently bishops or statesmen), partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in, but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority, as hath totally been disclaimed by their successors for now above a century past. The decrees of a court of equity were then rather in the nature of awards, formed on the sudden *pro re nata*, with more probity of intention than knowledge of the subject, founded on no settled principles, as being never designed, and therefore never used for precedents. But the systems of jurisprudence in our courts, both of law and equity, are now equally artificial systems, founded in the same principles of justice and positive law, but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements), from the imperial and pontifical formularies, introduced by their clerical chancellors. 3 Com. 433, 434. — 7. The suggestion indeed of every bill, to give jurisdiction to the courts of equity (copied from those early times), is, that the complainant hath no remedy at the common law. But he, who should from thence conclude, that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity reports, must think the law a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation in both courts are or should be exactly the same; both ought to adopt the best, or must cease to be courts of justice. Formerly some causes, which now no longer exist, might occasion a different rule to be followed in one court, from what was afterwards adopted in the other, as founded in the nature and reason of the thing; but the instant those causes ceased, the measure of substantial justice ought to have been the same in both. Thus the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce, nay after the statute of 37 Hen. 8. c. 9. had declared the debt or loan itself to be “the just and true intent” for which the obligation was given, their narrow-minded successors still adhered wilfully and technically to the letter of the antient precedents, and refused to consider the payment of principal, interest, and costs as a full satisfaction of the bond. At the same time more liberal men, who sate in the courts of equity, construed the instrument, according to its “just and true intent,” as merely a security for the loan: in which light it was certainly understood by the parties, at least after these determinations; and therefore this construction should have been universally received. So in mortgages, being only a landed as the other is a personal security for the money lent, the payment of principal, interest, and costs ought at any time, before judgment executed, to have saved the forfeiture in a court of law as well as in a court of equity. And the inconvenience as well as injustice of putting different constructions in different courts upon one and the same transaction, obliged the parliament at length to interfere, and to direct by the statutes 4 & 5 Ann. c. 16. and 7 Geo. 2. c. 20. that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be followed in the courts of law. 3 Com. 434, 435. — 8. Again, neither a court of equity nor of law can vary men’s wills or agreements, or (in other words) make wills or agreements for them; both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages; as a rent of 5*l.* an acre for ploughing up antient meadow: nor against a lapse of time, where the time is material to the contract; as in covenants for renewal of leases. Both courts will equitably

construe, but neither pretends to control or change a lawful stipulation or engagement. 3 Com. 435. — 9. The rules of decision are in both courts equally apposite to the subjects of which they take cognizance. Where the subject-matter is such as requires to be determined *secundum æquum et bonum*, as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts must submit to and follow those antient and invariable *maxims quæ relictæ sunt et traditæ*. Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the object of that law; as in case of the privileges of ambassadors, hostages, or ransom-bills. In mercantile transactions they follow the marine law, and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum*: in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject; and if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country, and would both decide accordingly. 3 Com. 436. — 10. Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, viz. the true construction of securities for money lent, and the form and effect of a trust or second use; upon these main pillars hath been gradually erected that structure of jurisprudence which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these commentaries, however different they may appear in their outward form, from the different taste of their architects. 3 Com. 436, 437. — 11. And, first, as to the mode of proof. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and that being once discovered, the judgment is the same in equity as it would have been at law. But for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account. As incident to accounts, they take a concurrent cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts. 3 Com. 437, 439. — 12. From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud; all matters in the private knowledge of the party, which, though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment obtained by suppressing the truth; and which, had the same facts appeared on the trial as now are discovered, he would never have obtained at all. 3 Com. 437, 438. — 13. As to the mode of trial. This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing wherever they happen to reside. If therefore the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend. 3 Com. 438. — 14. With respect to the mode of relief. The want of a more specific remedy than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution, unless where it is improper or impossible, instead of giving damages for their non-performance. And hence a fiction is established, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally: and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. So of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. Over questions

And dub. whether it be good by prescription; for that presupposes a grant; and the court of chancery, which is held by prescription, is a

questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdiction, to prevent the expence and vexation of endless litigations and suits. In various kinds of frauds it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief; as by setting aside fraudulent deeds, decreeing re-conveyances, or directing an absolute conveyance merely to stand as a security. And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands, a court of equity holds plea of all debts, incumbrances, and charges that may affect it or issue thereout. 3 Com. 438, 439.—15. The true construction of securities for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bona fide* advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may when out of possession be barred by length of time, by analogy to the statute of limitations. 3 Com. 439.—16. The form of a trust, or second use, gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction; but the trust is governed by very nearly the same rules as would govern the estate in a court of law, if no trustee was interposed; and, by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law. 3 Com. 439, 440.—17. These are the principal grounds of the jurisdiction at present exercised in our courts of equity; which differ we see very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived to maturity; as appears from the principles laid down; and the jealousies entertained of their abuse, by our early juridical writers before cited, and which have been implicitly received and handed down by subsequent compilers, without attending to those gradual accessions and derelictions, by which in the course of a century this mighty river hath imperceptibly shifted its channel. Lambard in particular, in the reign of Queen Elizabeth, lays it down, that “equity should not be appealed unto, but only in rare and extraordinary matters; and that a good chancellor will not arrogate authority in every complaint that shall be brought before him, upon whatsoever suggestion; and thereby both overthrow the authority of the courts of common law, and bring upon men such a confusion and uncertainty, as hardly any man should know how or how long to hold his own assured to him.” And certainly if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will. But since the time when Lambard wrote, a set of great and eminent lawyers, who have successively held the great seal, have by degrees erected the system of relief administered by a court of equity into a regular science, which cannot be attained without study and experience, any more than the science of law; but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision in a court of equity as in a court of law. 3 Com. 440, 441.—18. It were much to be wished, for the sake of certainty, peace, and justice, that each court would as far as possible follow the other, in the best and most effectual rules for attaining those desirable ends. It is a maxim, that equity follows the law; and in former days the law has not scrupled to follow even that equity which was laid down by the clerical chancellors. Every one who is conversant in our ancient books knows that many valuable improvements in the state of our tenures (especially in leaseholds and copyholds), and the forms of administering justice, have arisen from this single reason, that the same thing was constantly effected by means of a subpoena in the chancery. And sure there cannot be a greater solecism, than that in two sovereign independent courts established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.

fundamental court. Hob. 63. 2 Rol. 109. R. that it is not good by prescription for York, or other small corporation. 2 Rol. 266. l. 20.

But London may claim it by prescription. R. 2 Rol. 266. l. 15.

So the king cannot by commission appoint any one to determine matter of equity; for it ought to be determined in chancery, and such commission would be illegal and void. R. 12 Co. 114.

So, if the king constitutes a chancellor of a duchy, or other precinct, that does not give him authority to hold a court of equity. 2 Lev. 24.

(A 4.) Where held.

The court of chancery was usually held in *curia regis*; and therefore the process there is returnable *coram rege in cancellariâ suâ*. Mad. 131. 2 Inst. 316.

[(A 5.) Usage and practice of. (i)]

(B) Officers of the chancery.

(B 1.) Lord chancellor.

'The principal officer of the chancery is the lord chancellor. (h)

Temp. Ethelberti dicitur referendarius; ego referendarius subscripsi. Seld. Off. Ch. s. 1.

The chancellor is created by the delivery of the seal, and taking his oath. 4 Inst. 87. (l)

Sometimes by letters patent. 4 Inst. 87.

This office may be granted for life, or *durante bene placito*. Mad. 43.

Not for life. 4 Inst. 87.

But not in succession. 4 Inst. 78.

Cancellarii dignitas est ut secundus a rege in regno habeatur. Seld. Off. Ch. s. 3. Dict. in vita Tho. Becket. 4 Inst. 78.

By the st. 31 H. 8. 10. the chancellor, or keeper hath precedence of all nobility, except the royal blood. (m)

The chancellor is superior to all the judges of the kingdom. 1 Ch. R. Arg. 13. (n)

Cancellarius dicitur a cancellando, because upon a *scire facias* he cancels the patents of the king. 4 Inst. 88.

The chancellor and *custos sigilli* antiently were one officer.

Sigillum regium ad ejus pertinet custodiam. Dict. in vita Tho. Becket. Seld. Off. Ch. s. 3. 4 Inst. 78.

And though they have been sometimes divided since the time of II. 2. Seld. Off. Ch. s. 4. 1 Rol. 385. l. 25., &c.

(i) 1. The uniform practice of the court of chancery is, without positive order, obligatory as the law of the land. 2 Mer. 1. — 2. And when of long duration, supported by decisions, will operate to reverse an order. 1 V. & B. 327, 328.

(k) Who sits alone, and is styled the lord high chancellor of Great Britain.

(l) Lamb. Archæion, 65. 1 Rol. Abr. 385.

(m) That is, the temporal lords. He is inferior in rank to the archbishop of Canterbury.

(n) And may be lord chief justice (of K. B. e. gr.) at the same time; as lord Hardwicke was, from 20th February to 7th June.

Yet by the st. 28 H. 3. it was enacted, *si rex abstulerit sigillum a cancellario, quicquid fuit interim sigillatum irritum habeatur.* Seld. Off. Ch. s. 4.

By the st. 5 El. 18. the lord keeper ever had, and shall have, like place, authority, jurisdiction, and advantages, as the lord chancellor. Semb. by most of the judges. 3 Inst. 113, 114.

By the st. 1 W. & M. 21. commissioners of the great seal (*o*) shall exercise like authority, jurisdiction, and use the like customs, privileges, and advantages, as the lord chancellor and keeper (*p*); and have precedence after peers, and the speaker of the house of commons, or, if a peer, according to peerage. (*q*)

And now there cannot be a lord chancellor and lord keeper at the same time; for by the st. 5 El. 18. they are declared to be the same office. 4 Inst. 88.

The chancellor, or keeper, is made by the delivery of the great seal to him by the king, and taking his oath. 4 Inst. 87.(*r*)

The lord chancellor, or keeper, cannot make a deputy, 4 Inst. 88 (*s*); but this was allowed, when the office was granted for life. Mad. 44.

By

(*n*) It sometimes happens that, upon a vacancy of the chancellorship, commissioners are appointed by the crown to execute the duties of that office. They are usually three in number, and are selected from the judges in the courts of common law. The custody of the great seal is committed to the care of the commissioner who takes precedence of the rest. Newl. 2.

(*p*) And by s. 3. though to a decree, and to sealing with the great seal instruments which require the whole broad seal, two commissioners must be present; yet one may hear motions, and give orders touching interlocutory proceedings in a cause.

(*q*) 1. The same statute provides, that any one commissioner (in the absence of the others) may hear motions and give orders and directions touching the interlocutory proceedings in any cause, so as such one commissioner, in the absence of the others, shall not make any decrees, or put the great seal to any thing whereunto the whole broad seal ought to be affixed, unless there be two commissioners. — 2. In order that the business of the court may not be interrupted by the absence of the lord chancellor, from illness or other cause, there is a commission addressed to the then puisne judges, and the then masters, authorizing any three of them, of whom a judge is to be one, to transact the business of the court. Newl. 3. — 3. When the business of the court is dispatched, under the authority of this commission, it is done by one judge and two masters, who sit with the judge, join in making the orders, and constitute a necessary part of the court. Ibid. — 4. Besides this provision in case of absence, the lord chancellor is entitled to call to his assistance on the bench any of the judges, as he shall think proper. Ibid.

(*r*) 1. After which an entry is made upon the close-roll of the court of chancery, at what time, and in whose presence the great seal was delivered to him. Newl. 2. — 2. He is removable at the king's pleasure, and the re-delivery or the resumption of the great seal determines the office of chancellor. Ibid.

(*s*) 1. The 53 G. 3. c. 24. after reciting that the number of appeals and writs of error in parliament, has of late years greatly increased, and that it has become necessary, that a larger proportion of time should be allotted for hearing and determining such appeals, &c. than has usually been employed for that purpose; enacts that it shall be lawful for the king to nominate and appoint from time to time, by letters patent under the great seal of the united kingdom, a fit person being a barrister at law of fifteen years standing at the least, to be an additional judge assistant to the lord high chancellor, lord keeper, or lords commissioners for the custody of the great seal of the united kingdom, in the discharge of the judicial functions of their respective offices, to be called *vice-chancellor of England*, to hold such office during good behaviour. — 2. And by s. 2. such vice-chancellor shall have power to hear and determine all causes, matters, and things which shall be at any time depending in the court of chancery of England, either as a court of law, or as a court of equity, or incident to any ministerial offices of the

By the st. Art. super Chant. 28 Ed. 1. 5. the lord chancellor and the justices of the king's bench shall follow the king, so that he may have at all times near him some sages of the law, able to order all matters which shall come to the court.

Cancellarii dignitas est ut omnibus regis adsit conciliis, etiam non vocatus. Seld. Off. Kanc. s. 3. (t)

So the chancellor may hear causes in B. R. or C. B. 2 Inst. 552, 3.

When the king's charters, and pleas in the king's courts increased, and the power of the chief justicier declined, the office of chancellor rose to great eminence. Mad. 42, 3.

(B 2.) His oath.

The chancellor was sworn that he should not sell, deny, or delay a remedial writ, or right. 1 Rol. 384. l. 35.

said court, or of the lord chancellor, &c. for the time being, by the special authority of any act of parliament, as the said lord chancellor, &c. shall from time to time direct; and all decrees, orders, and acts of such vice-chancellor so made or done, shall be deemed to be the decrees of the said court of chancery, and to be executed accordingly; subject, nevertheless, to be reversed, discharged, or altered by the lord chancellor, lord keeper, or lords commissioners aforesaid; and no such decree or order shall be enrolled, until the same shall be signed by the lord chancellor, &c. for the time being; provided that such vice-chancellor shall have no power to discharge, reverse, or alter any decree, order, act, &c. made or done by any lord chancellor, &c. unless authorized by the lord chancellor, &c. for the time being so to do; nor to discharge, &c. any decree, &c. of the master of the rolls. — 3. It has been adjudged, that he may supersede a commission of bankruptcy. 2 Rose, 162, 235. n. — 4. That he may certify the propriety of a *procedendo* upon a *supersedeas* on his certificate. 1 Buck, 3. — 5. And that the chancellor will direct a *procedendo* upon a commission superseded by vice-chancellor's order, confirmed by chancellor. 1 Buck, 45. — 6. By s. 3. of said statute, such vice-chancellor shall sit for the lord chancellor, lord keeper, or lords commissioners aforesaid, whenever they shall respectively require him so to do; and shall also, at such other times as the lord chancellor, &c. shall direct, sit in a separate court, whether the lord chancellor, &c. or the master of the rolls, shall be sitting or not; for which purpose the said lord chancellor, &c. shall make such order as to them respectively shall appear to be proper. — 7. And by s. 4. such vice-chancellor shall have rank and precedence next to the master of the rolls. — 8. By s. 5. it shall be lawful for the king by such letters patent as aforesaid, or any other letters patent under the great seal of the united kingdom, to direct that such vice-chancellor shall have a secretary, train-bearer, and usher; and that the secretaries and deputy registers, and other officers appointed to attend the lord chancellor, &c. shall attend such vice-chancellor, &c. when sitting for the lord chancellor, &c. and also when sitting in his separate court, as circumstances shall require, and as the said lord chancellor, &c. shall direct. — 9. Provided that it shall be lawful for the king to remove any such vice-chancellor from his office, upon an address of both houses of parliament. — 10. By s. 7. said vice-chancellor, previous to his executing any of the duties of his office, shall take the following oath, which the lord chancellor, &c. or the master of the rolls, shall administer: "I — do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and power, execute the office of vice-chancellor of England. So help me God." — 11. And s. 8. to 13. provide salaries for the vice-chancellor and said other officers, out of the common and general cash belonging to the suitors of the court of chancery, lying dead and unemployed in the bank of England.

(t) 1. That is, he is a privy councillor by his office. — 2. And, according to Lord Chancellor Ellesmere, is prolocutor of the house of lords by prescription. Office of lord chancellor, edit. 1651. 5 Com. 47. — 3. To him belongs the appointment of all justices of the peace throughout the kingdom. Ibid. — 4. Being formerly and usually an ecclesiastic (for none else were then capable of an office so conversant in writings), and presiding over the royal chapel, he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of 20l. *per annum* in the king's books. Ibid. — 5. He is the general guardian of all infants, idiots, and lunatics. Ibid. — 6. And has the general superintendence of all charitable uses in the kingdom. Ibid.

And

And the usual oath requires, that he shall well and truly serve the king and his people in the office of chancellor; that he shall do right to all people, poor and rich, after the laws and usages of the realm; that he shall truly counsel the king, and his counsel laine (*i. e.* hide) and keep; that he shall not suffer the hurt or disherison of the king, or that the rights of the crown be decreased, as far as he can let it; and if he cannot let it, shall make it expressly known to the king, with his advice and counsel: that he shall do the king's profit in all he reasonably may. 4 Inst. 88. 3 Rush. 1102.

(B 3.) And duty.

And therefore, if a chancellor sell a writ remedial, it is a great abuse. 1 Rol. 384. l. 30.

A chancellor, upon the removal of a record before him by *certiorari*, when any one is found guilty of homicide by misadventure, or *se defendendo*, shall grant him a pardon, without a warrant from the king, or communication with him. 2 Inst. 316.

Vide post, (C 1, 2.) (u)

Vide

(u) *Officers to the Lord Chancellor.* — 1. *Purse-bearer.* This officer is to pay constant attendance upon the lord chancellor; to receive all warrants and writs of privy seal; to write the proper recepi thereon, and lay the same before the lord chancellor, for his signature to the recepi; and also to take and execute all orders relative to the keeping, opening, and fixing the great seal to all grants, patents, commissions, writs, and instruments, whether by public or private seal. The duties of the office are executed by the purse-bearer in person; a principal and deputy do not appear to have been appointed since the year 1756. Newl. 41. — 2. *Principal Secretary to the Lord Chancellor.* It is the duty of this officer to attend the lord chancellor in turn with his lordship's other secretaries, and whenever else he is required so to do. He is to receive, examine, and write the answers to all petitions preferred to the lord chancellor, in causes and other matters not belonging to the duties of the other secretaries; and, after submitting the same to his lordship for approbation and signature, to return the petitions to those who have presented them. He is to enter every petition, and the answer thereto, in a book kept for that purpose; and to make out for his lordship and certain officers, including the registers, lists of such petitions as are to be heard. He is to attend the hearing of all petitions preferred to the lord chancellor as visitor on behalf of the crown, to take minutes of and to draw up the orders made thereon, and to enter such orders in the book before mentioned; he is to prepare and issue letters missive to peers and privileged persons; he is to prepare and issue warrants to the serjeant at arms, the messenger or pursuivant attending the court, and the warden of the Fleet prison; he is to tax costs in error in the exchequer chamber; he is to set down all causes to be heard before the lord chancellor, above the limited numbers which the senior deputy register and other officers are entitled to set down; he is to make out and enter in the before-mentioned book, the appointments of the accountant general, the deputy registers, the clerk of the reports, and the entering clerks; and also to make out and enter in the same book the usual order on the appointment of a master in chancery, for transferring to him all causes and other matters which had been by former orders referred to his predecessor. He is to enter in the same book the certificates from the lord chancellor to the clerk of the hanaper, authorizing payment to the messenger, or pursuivant attending the court, of certain charges on proclamations and writs of election. Newl. 41, 42, 43. — 3. The principal secretary's office is open, and attendance is there given, on every day in the year (excepting Sundays, Good Friday, and Christmas day), from nine in the morning till nine in the evening. Newl. 43. — 4. *Lord Chancellor's Secretary of Decrees and Injunctions.* This officer is to receive and examine the dockets of decrees and dismissions which are to be enrolled, and to write the orders upon petitions relating thereto; to receive and examine all orders for injunctions and the writs of injunction and dockets (which are copies of the writs); to procure his lordship's signature to such dockets of decrees or dismissions,

(B. 4.) Master of the rolls.

Ad cancellarium pertinet rotuli qui est de cancellaria custodia per suppositam personam. Seld. Off. Ch. s. 3.

And his office is as ancient as the court itself. (x)

In the 23 Ed. 1. a grant was made *Ada de Osgodby*, by the chancellor *ex parte regis*. Dugd. Orig. Jud. Chronica, series 33.

And such grant was, *ita quod custodiam habeat eodem modo, quo alii custodes habere consueverunt.*

It is said, that the master of the rolls by his commission (y) cannot make (z) a decree, without the assistance of two masters; 1 Ver. 274; but this does not appear by the decretal order there recited. (a)

(B 5.)

orders upon petitions, writs of injunction and docketts, and to make an entry of the same in a book kept for that purpose; also, to receive and enter in the same book all caveats against signing and enrolling decrees or dismissions, and to give notice thereof to the parties concerned. Newl. 45.

(x) 1. It is observed in a work ascribed to Lord Hardwicke, that there is no one species of all the judicial acts performed on the common law side of the court of chancery, of which there are not instances of their being also performed by the master of the rolls. — 2. But this, says Mr. Maddock, has been a matter of much controversy, and it has been as positively said, and seems to be the better opinion, that his honour has no original jurisdiction respecting matters arising on the common law side of the court of chancery. 1 Madd. 20. — 3. It is laid down in Sir Joseph Jekyl's Treatise on the Office of the master of the rolls, that he has a judicial authority in two distinct capacities, from the ancient constitution of his office; one, as master of the rolls sitting at the rolls, (and from his decrees in that capacity there lies an appeal to the chancellor in court): where he has the power of hearing and determining originally the same matters as the lord chancellor, excepting cases in lunacy and bankruptcy, vide infra; the other, as *locum tenens* of the chancellor *virtute officii*, without any special commission; when he sits in court for (and his acts are of equal force with those of) the chancellor: when he sits by virtue of a special commission, there are others joined with him, whose concurrence may be necessary. — 4. Formerly he could direct a case to a court of law only when sitting for the chancellor. 1 B. C. C. 88. — 5. Now he may send one from the rolls. 6 T. R. 307. — 6. But the case must not be stated as a trust. 5 Ves. 578. — 7. Which rule applies generally to cases from equity. — 8. See 23 G. 2. c. 25. & 1 Geo. 4. c. 107. touching his revenue. — 9. And 17 G. 3. c. 59. with its recitals, touching the estate within the liberty of the rolls.

(y) He is appointed by the crown, by patent, and holds his office for life. Newl. 3.

(z) He may grant as many concurrent leases as he pleases during the last seven years of a former lease, and may at any time take a surrender, and renew for twenty-one years. 4 Burr. 1975. 1 Blk. 617.

(a) 1. The 3 G. 2. c. 30. (for putting an end to the questions which had arisen touching the authority of the master of the rolls), enacts, that all orders and decrees made by his honour (except such orders, &c. as by the course of the court of chancery ought only to be made by the great seal), shall be considered as valid orders of said court; subject to be discharged, reversed, or altered, and only to be enrolled when signed by the great seal. — 2. *Subpoenas* returnable immediately are within the exception. Ord. Ch. 37. — 3. The master of the rolls is also the chief of the twelve masters in chancery, and chief clerk in the petty bag office, and he is the keeper of all the records of the court of chancery, after the decrees and orders have been enrolled; and on that account he was antiently styled Guardian des Rolles. Newl. 4. — 4. The master of the rolls ranks immediately after the chief justice of the king's bench. Ibid. — 5. *Chief Secretary to the Master of the Rolls.* The duties of this officer are, to attend his honour in court, and on all other public occasions; to attend in the office in the rolls for the dispatch of business; to peruse and present to his honour every petition preferred to him (except such as it is the duty of the under-secretary and secretary of causes to present), and to write thereon the answer or order given by his honour; to enter

enter in a book, kept for that purpose in the office, the name and time of admittance of every six clerk, sworn clerk of the six clerks' office, and waiting clerk of the same office; also to enter therein the name of every articulated clerk of the same office at the time of his entering into articles with any of the sworn clerks of that office, and the date of such articles; and to give notice in writing of the application of every person to be entered an articulated clerk, previous to his executing his articles of clerkship; to enter in the same book the name and time of admittance of every clerk of the petty bag office, and of every examiner of the court of chancery, and of every copying clerk in the examiner's office; to peruse and examine the credentials of articulated clerks, and of attorneys applying to be admitted solicitors of the court of chancery, previous to their examination and admission by his honour, and to enter in a book due notice of every such application. The attendance at this office, from the first seal before every term to the last seal after term, is from ten in the morning till two in the afternoon, and from six till eight in the evening. From the last seal after every term, to the first seal before the ensuing term (except as after mentioned), the attendance is from ten in the morning till two in the afternoon; from the petition day following the last seal after Trinity term, to the petition day before Michaelmas term, the attendance is from ten in the morning till one in the afternoon. Newl. 44, 45.—6. The holidays are from Thursday before till Monday after Easter week; from Whit Sunday till the Monday week following, and from the 24th of December till the 7th of January; also, the 30th of January, 2nd of February, Ash Wednesday, Ascension Day, 29th of May, 4th and 24th of June; 12th, 16th, 21st, and 24th of August; 14th, 21st, 22nd, and 29th of September; 18th, 25th, 26th, and 28th of October; and every Saturday between the petition day following the last seal after Trinity term, and the petition day before Michaelmas term. Newl. 45.—7. *Under Secretary at the Rolls.* The duties of this officer are to peruse and present to the master of the rolls every petition for the admission of a plaintiff or defendant to sue or defend in *forma pauperis*, and every petition presented by a pauper after admission as such, or by a person entitled to the privilege of the court; to write thereon the answer or order made by his honour, and procure the same to be signed by him; to enter the name of the cause in which such order is made, and the order, in a book kept for that purpose; also to enter in a book the name of every cause in which any petition is presented, for which the chief secretary has a fee of five shillings, and the order made on such petition. He is likewise to perform the duties of the chief secretary during his absence, and to attend upon his honour's person when required. Newl. 46.—8. The hours of attendance, and the holidays of this officer, are the same as those of the chief secretary. Newl. 46.—9. *Secretary of Causes at the Rolls.* The duties of this officer are to set down causes for hearing before the master of the rolls, and to draw and sign a note to the register, certifying to him the name of every cause so set down; to peruse, present to his honour, and write the order upon all petitions of the following kind, viz. for setting down of causes, to have bills taken *pro confesso*, and for setting down of causes at the request of the defendant, and for restoring to the paper causes which having been struck out thereof; also to write the order on petitions for re-hearing and for setting down of causes upon a master's report upon an equity reserved, and for further directions; and also on petitions for adjourning of causes. Newl. 46, 47.—10. The hours of attendance of this officer, and the holidays kept by him, are the same as those of the chief secretary. Newl. 47.—11. *Secretary of Decrees and Injunctions at the Rolls.* This officer is to present to the master of the rolls the docket of every decree or dismissal, pronounced by his honour, to be signed by him in order for the enrolment thereof; to enter the name of the cause in which such decree or dismissal is pronounced, the date of the decree or dismissal, and the time of such signing the docket in a book kept by him for that purpose; also to enter thereon the docket of every injunction granted by his honour, and present the same to his honour for signature; to set down in the same book all caveats that shall be desired to be entered against his honour's signing any decree or dismissal, and to give notice thereof to the parties concerned, and to attend his honour when any of such business is to be transacted. Newl. 47, 48.—12. His hours of attendance at the office, and the holidays kept by him, are the same as those of the chief secretary. Newl. 48.—13. *Keeper of the Records in the Rolls Chapel, or Clerk of the Chapel at the Rolls.* The duty of this officer is to take care of the records in the chapel at the rolls; to make annual indexes or calendars of them, as they are brought to the chapel; to attend and produce such indexes and records, to those who are desirous of making searches or of reading the records themselves; to make copies and exemplifications of the same when required; to attend the two houses of parliament, or their committees, and the courts of judicature, with the records, when required; to attend the master of the rolls on cancellations of records, of recognizances, deeds, and letters patent. Newl. 48.—14. The hours of attendance are from ten in the morning till three in the afternoon, and from

(B 5.) Masters of chancery.

There are twelve (b) masters (c) of chancery, assistant (d) to the chancellor, or keeper. Vide Practical Register in Chancery, 236.

Cancellario

five till eight in the evening. The holidays are, one week at Christmas, one week at Easter, and one week at Whitsuntide, besides Good Friday, and general thanksgiving and fast days. Newl. 49. — 15. Besides the above officers, there are clerks to the deputy registers, clerk of the exceptions, and agent to the senior deputy register, agent to the master or clerk of the report office, clerks of the entries, agents or clerks to the clerks of the entries, copying clerks in the examiner's office, deputy agent or under clerk of the six clerks, sixpenny writ office, chaff wax, deputy chaff wax, sealer, deputy sealer, usher of the court, deputy purse bearer, the serjeant at arms, messenger or pursuivant attending the court of chancery, gentlemen of the chamber attending the great seal, usher of the hall at Lincoln's-inn, or at the lord chancellor's, crier of the court, deputy of the warden of the Fleet, or the lord chancellor's tipstaff attending the court, door keeper of the court, keeper of the court, gentlemen of the chamber attending the master of the rolls, usher of the hall at the rolls, porter at the rolls, tipstaff to the master of the rolls, secretary to the vice-chancellor of England, train-bearer to the last-mentioned judge, and usher to him. Newl. 49.

(b) Eleven, besides the master of the rolls, who is the chief of them.

(c) 1. For better securing the monies and effects of the suitors of the court of chancery, the 12 G. 1. c. 32. *recites* a certain order of the lords commissioners, dated 26th May 1725, for the masters to deliver into the bank the money and effects under their care, and a certain other order of the lord chancellor, dated the 4th November following, directing the said order of the 26th May to be observed with the additions in the said order of the 4th November contained; and *enacts*, — 2. That the said two orders shall be observed, unless in such points as shall be varied in this act, or be hereafter changed by the court of chancery. — 3. And by s. 3. provides, that there shall be one person appointed by the court of chancery to do all such things relating to the delivery of the suitors money and effects into the bank, and taking them out, and the keeping the accounts with the bank, as by the said orders are directed to be done by the masters and usher, which officer shall be called the *Accountant General of the Court of Chancery*, and shall hold such office during the pleasure of the court; and an account shall be kept in his name with the bank of England, on behalf of the suitors, in such manner as is directed by the said orders with respect to the masters; and the same rules as are prescribed by the said orders to the masters, usher, and bank, as to the delivering in and taking out of the monies and effects of the suitors and other matters therein contained, shall be observed by the suitors, the bank, and the accountant general, unless where the court shall otherwise determine. — 4. By s. 4. the accountant general shall stand in the place of the masters and usher; and shall receive no other fee from the suitors than what is allowed to the masters by the said order of 26th May. — 5. And by s. 5. all mortgages, tallies, orders, stocks, annuities, and other transferrable securities to be taken in the name of any officer of the court, shall be taken in the name of the accountant general; and in all such assignments, the particular trust shall be specified; and such other rules in respect to such transferrable securities shall be observed by the accountant general and others, as by the said orders are appointed to be observed by the masters, usher, and others. — 6. By s. 6. the court of chancery shall have power to vary the regulations in the said orders, as herein-before contained, and to make such further regulations about the premises as to the court shall seem meet. — 7. By s. 7. after the death or removal of any accountant general all mortgages, &c. vested in him in trust for the suitors, shall vest in the succeeding accountant general, subject to the same trusts, without any assignment or transfer; and all monies and effects of the suitors, for which he shall have credit in his account with the bank, shall be carried to the account of the succeeding accountant general. — 8. And by s. 8. the accountant general shall not meddle with the actual receipt of any of the suitors money or effects, but shall only keep the account with the bank; and, observing the rules hereby prescribed or hereafter to be prescribed by the court, he shall not be answerable for any money or effects which he shall not actually receive; and the bank shall be answerable for the money and effects of the suitors received by them. — 9. It has been ruled, that money in the funds belonging to wards of the court cannot be transferred to the accountant general to the credit of the cause, until the account is taken before the master.

1 B. C. C. 56. — 10. And that where money is directed by an act of parliament to be paid to the accountant general, he is bound by the act to receive it, nor will the court make an order for that purpose. 1 Ves. j. 56. — 11. The 12 G. 1. c. 33. s. 20. further provides, that all the money deposited in the bank on account of the suitors of the court of chancery, by order of the court, shall be one common and general cash, and shall be promiscuously issued, as the court shall direct, for answering the demands of any of the suitors. — 12. Statutes have passed from time to time, charging this fund with various burthens. — 13. The 54 G. 3. c. 14. further enacts, that in all cases in which by virtue of this act, or of any act of parliament, conveyance, assignment, transfer, obligation, or security, any interest in real or personal estate, &c. hath been or shall be vested in or made payable or secured to the accountant general of the court of chancery in respect of such his office, the same upon the death, removal, or resignation of such accountant general shall vest (subject to the same trusts as the same were before respectively subject to) in the succeeding accountant general, by force of this act, and without any act to be done by the accountant general resigning, removed, or dying, or any person claiming under him or them, and notwithstanding any such interest may have been expressed to have been vested, &c. in the accountant general, his heirs, executors, administrators, and assigns, or any of them, and shall and may be proceeded upon in the name of such succeeding accountant general, &c. — 14. And by s. 2. in all cases in which by virtue of any act of parliament, &c. any interests in any real or personal estate have been heretofore vested in any former accountant general, as accountant general, and which notwithstanding may now remain vested in his heirs, executors, or administrators, the same shall by force of this act be vested in the present accountant general and shall and may be proceeded upon in the name of the present accountant general, or the accountant general hereafter for the time being, &c. — 15. And by s. 3. all acts done or to be done by the present or any future accountant general under any order or decree of the court of chancery, touching any real or personal estate, the interest wherein is by this act vested in the present accountant general, and in succeeding accountants general, shall by force of this act be deemed valid; and also all acts heretofore done by any accountant general for the time being in obedience to any such order or decree, touching any real or personal estate, the interest wherein might have remained at the time such acts were done in any former accountant general who had resigned or been removed, or in the heirs, executors, or administrators of any then deceased accountant general, shall by force of this act be deemed to be valid. — 16. The governor and company of the bank of England have the general custody of the effects of the suitors of the court of chancery, as the bankers of the court, subject to the orders of the court. These effects consist of cash, stocks, exchequer bills, India bonds, shares in public companies, and specific articles deposited: all these effects are placed in the bank in the name of the accountant general. Newl. 15. — 17. The accountant general does not receive any of the money or effects of the suitors of the court; but they are placed in the bank of England in his name, and he keeps an account with the bank according to the several causes and accounts to which such money and effects severally belong. The dividends and interest of the several stocks, India bonds, and other securities, are received by the bank as they become due, under a power of attorney from the accountant general, and placed to the credit of the causes and accounts to which they respectively belong: the bank send quarterly to the accountant general's office a book called the dividend book, signed by an officer of the bank, which book, containing the amount of the securities and interest money belonging to each cause and account, is countersigned by the accountant general, and sent into the report office. For each sum of money to be received by the bank, the accountant general signs a certificate, mentioning the order, report, or act of parliament under the authority of which the person named in the certificate is to pay the sum therein specified, and directing it to be placed to his account as accountant general, to the credit of the particular cause or account mentioned. When the party paying in the money, or his solicitor, brings into the accountant general's office a certificate from the bank of such payment having been made, the accountant general signs another certificate of such payment, and annexes it to the bank certificate, for the purpose of being entered in the report office. Newl. 16, 17. — 18. For each sum of stock directed by any order of the court to be transferred into the name of the accountant general, application is made to the first clerk in the office for a ticket or notification specifying the amount of the stock to be transferred, and the cause or account to which it is to be placed when such transfer is made; the accountant general accepts the stock, and signs a certificate to the bank of his having made such acceptance; of this transfer of stock there is a certificate sent from the bank, or such other office where the stock may be, to the accountant general's office; and the accountant general signs another certificate of such transfer,

transfer, and of his acceptance of the stock, and annexes it to the certificate from the bank, or such other office where the stock may be, for the purpose of being entered in the report office. Newl. 17. — 19. For each parcel of exchequer bills, or India bonds, and for each package containing specific articles directed by any order of the court to be deposited in the bank in the name of the accountant general, he signs a direction for the person named in such order, to make such deposit in the bank in his name, and to what cause or account it is to be placed. When the party or his solicitor brings into the accountant general's office a certificate from the bank that such deposit has been made, the accountant general signs another certificate, that such deposit has been made into the bank, and annexes it to the bank certificate for the purpose of being entered in the report office. Newl. 17, 18. — 20. For each sum of money directed to be paid out under any order, the accountant general draws on the bank by a note under his hand, entitled in the particular cause or account out of which the money is to be paid; this note is entered at the report office, and marked and countersigned by one of the deputy registers of the court; if the money for which such note is drawn is not for interest or maintenance, the accountant general signs a certificate of such note, which certificate is filed in the report office. Newl. 18. — 21. For each sum of money directed to be laid out in the purchase of stock, exchequer bills, or India bonds, the accountant general draws on the bank in the particular cause or account by a note under his hand for the amount of such sum. This note is also entered in the report office, and marked and countersigned by one of the deputy registers of the court. If the money for which such note is drawn is principal money, the accountant general signs a certificate of such note, which certificate is filed in the report office. If the purchase for which this note is drawn should be stock, the accountant general accepts such stock by signing his name in the transfer book at the bank, or at any other office where such stock may be; and then signs a certificate to the bank of his acceptance of such stock, in such particular cause or account. The bank also sends to the accountant general's office a certificate that the transfer of such stock has been made; and the accountant general signs another certificate of the particulars of such purchase, transfer, and acceptance of stock, and annexes it to the bank certificate, for the purpose of being entered in the report office. If the purchase for which the note is drawn should be exchequer bills, or India bonds, the bank send to the accountant general's office a certificate of such exchequer bills, or India bonds, having been purchased and deposited in the particular cause or account mentioned in the note, and the accountant general signs another certificate of the particulars of such purchase and deposit, and annexes it to the bank certificate for the purpose of being filed in the report office. Newl. 18, 19. — 22. When any sum of stock is by any order directed to be transferred, or when any sum of stock, or any exchequer bills, or India bonds are by any order directed to be sold; or when any exchequer bills, India bonds, or specific articles in packages are by any order directed to be delivered out, the party or his solicitor brings to the accountant general's office a certificate, from one of the deputy registers of the court, of what stock is to be transferred, and to whom; and of the stock, bills, or bonds to be sold, and to what amount; of the bills, bonds, or specific things in packages to be delivered out, and to whom, and from what cause or account. In transfers of stock the accountant general signs, and sends to the bank a certificate of his having made such transfer, and of the cause or account from which the same is made, and then signs another certificate of such transfer to be filed in the report office. In sales of stock the accountant general signs a certificate to the bank of the stock sold, and the money raised in the particular cause or account. On sales of exchequer bills, or India bonds, the deputy register's certificate is countersigned by the accountant general, who, after having received from the bank a certificate of the particular bills or bonds sold, the amount of the money raised, and the cause or account in which the sale is made, signs another certificate of the particulars of such sale, and annexes it to the bank certificate, to be filed in the report office. When exchequer bills, and such other things as before mentioned, are delivered out, the deputy register's certificate is countersigned by the accountant general, and sent to the bank; and the bank having sent to the accountant general a certificate of the particulars of such bills and other things delivered out, and to whom, and from what cause or account, the accountant general signs another certificate of such delivery, and annexes it to the bank certificate to be filed in the report office. Newl. 19, 20, 21. — 23. When any exchequer bills are to be paid off or exchanged, the party or his solicitor leaves the order at the accountant general's office, and requests that the principal and interest due on the bills may be received, or that the exchequer bills may be exchanged; then the accountant general signs a direction to the bank for the principal money and interest due on such bills, to be received and paid into the bank in his name, or that the exchequer bills received in exchange may be deposited there in his name, and placed to the cause or account to which such bills, or the money raised upon them, belong: the bank then

Cancellario associantur clerici honesti, &c. regi jurati, qui in legibus et consuetudinibus Anglicanis noticiam habent pleniorum, quorum officium

send a certificate to the accountant general's office, that his directions have been complied with; and then the accountant general signs another certificate that the bills have been exchanged, or that the principal and interest have been received upon them, and annexes it to the bank certificate for the purpose of being filed in the report office. Newl. 21. — 24. When any sum of cash or stock is directed by any order to be carried over from one cause or account to another, the accountant general signs a certificate to the bank, directing such sum of cash or stock in a particular cause or account to be carried over to some other cause or account, mentioning the order under the authority of which such carrying over is directed; the bank then send a certificate to the accountant general's office of such carrying over having been made; the accountant general then signs another certificate of such carrying over, which is annexed to the bank certificate, for the purpose of being filed in the report office. Some of the before-mentioned operations take place on almost every day when the office is open. Newl. 21, 22. — 25. By the st. 36 Geo. 3. c. 52. the person having, or taking the burthen of any will or testamentary instrument, or the administration of any personal estate, in the case of infancy, or absence beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, charged with the legacy duty, is enabled to pay such legacy or residue, after deducting the duty charged thereon, into the bank in the name of the accountant general, to the account of the person for whose benefit the same is payable; and such money, when so paid in, is directed to be laid out by the accountant general, without any formal request for that purpose, in the purchase of bank 3 per cent. consolidated annuities. Newl. 22. — 26. The accountant general also makes out certain certificates, being statements, of the amount of cash and other effects standing in the particular causes or accounts to which such certificates severally relate. They are made out, whenever they are applied for, by the clerk in court, or solicitor in the cause or matter, and are all signed by the accountant general. A very considerable number of such certificates are usually required in the course of a year. Newl. 23. — 27. The accountant general attends two or three days, and often four or five days in a week, at the bank of England, and other places, for the purpose of making sales, transfers, and acceptances of stock, according to the orders of the court. He also attends in his turn as a master in ordinary at the public office, for the purpose of discharging the same duties as the other masters in ordinary discharge when they attend there. The hours of attendance at the accountant general's office are from nine in the morning till two in the afternoon, and from four in the afternoon till seven in the evening. Newl. 23. — 28. The holidays are King Charles's Martyrdom, Candlemas-day, Lady-day, Ascension-day, King Charles's Restoration, Midsummer-day, Powder Plot, Lord Mayor's day, the birth-days of the King, Queen, and Prince of Wales; at Christmas, from Christmas eve to the 7th of January; at Easter, from the day before Good Friday to the Monday after Easter week; and at Whitsuntide, the whole of the Whitsun-week. In what is called the long vacation the office is shut by an order of the court, usually from the latter end of August, or the beginning of September, to the first general seal before Michaelmas term following, in order to adjust the accounts of the suitors with the books kept at the bank, and at the report office. The accountant general has several clerks under him to assist him in the performance of his various duties. Newl. 23, 24.

(d) 1. The court of chancery, upon the division of courts, having retained the right of affixing the great seal to patents, writs, and commissions, and of issuing original process; masters were appointed in that court, whose business it was to make out the forms of the writs, and when made, the same were entered in a book called the Register; and such writs were precedents in future for the like cases; and exceptions used to be taken to writs in the courts to which the same were directed, for not corresponding with the register. Harr. 5. — 2. After the masters in chancery had settled the proper form of writs and commissions, and those things began to be of course, the same in process of time came to be settled by the cursitors, who in their original institution were clerks to the masters, though now they form a distinct office. Ibid. — 3. The writs agreed upon by the master clerks were called "Magistralia," in contradistinction to those which were framed by the cursitors, or clerks to the masters, and were called "Brevia formata de cursu." Harr. 6.

sit (e) querelas, &c. audire et examinare et debitum remedium exhibere per brevia regis. Fleta, l. 2. c. 13. 2 Inst. 407. (f)

And

(e) 1. It is the duty of the masters to execute the orders of the court of chancery, upon references made to them by the court, acting either in exercise of its original jurisdiction, or under the authority of any act of parliament, or by the lord chancellor or vice-chancellor, in lunacies or bankruptcies; and by reports in writing, to certify in what manner they have executed such orders. Newl. 6. — 2. Mr. Newland enumerates the following heads of reference as those which most frequently occur: To examine into any alleged impertinence or scandal in any bill or answer, and into the sufficiency of any answer or examination. — 3. To examine into the regularity of proceedings had in court, and into all alleged contempts of the court. — 4. To settle interrogatories for the examination of parties. — 5. To take the accounts of executors, administrators, trustees, and guardians, and between parties of every description. — 6. To inquire into and decide upon the claims of creditors and legatees, and next of kin. — 7. To appoint receivers of personal estates, and of the rents of real estates, fix their salaries, and examine their accounts. — 8. To inquire as to repairs to be done, and into the propriety of felling timber, and granting leases. — 9. To sell estates, and to approve of the investment of trust money in the purchase of estates, and for this purpose to inquire into their value, to investigate the title to them, and settle the conveyances. — 10. To inquire for the heirs and next of kin of persons dying intestate. — 11. To appoint guardians of the persons and estates of infants, and to allow proper sums for their maintenance and education. — 12. To appoint committees of the persons and estates of lunatics, and to examine the accounts of such committees. — 13. To tax the costs of proceedings in any suit, or under the orders of the court. — 14. And also the bills of costs of solicitors, delivered to their clients, and referred for taxation under the 2 Geo. 2. c. 23. — 15. And also the bills of costs of solicitors for business done in bankruptcy, pursuant to the 5 Geo. 2. c. 30. — 16. To inquire whether infants are trustees or mortgagees within the 7 Ann. c. 19. — 17. To inquire under the 39 Geo. 3. c. 56. into the interest of parties in money, subject to be laid out in the purchase of lands. — 18. And in general, there is no question of law or equity, or disputed fact, which a master may not have occasion to decide, or respecting which he may not be called upon to report his opinion to the court. Newl. 8. — 19. The masters have also the custody of such title-deeds and original instruments as the court thinks fit to place under their care, for the security and benefit of the parties interested therein. Ibid. — 20. They likewise attend the lord chancellor and master of the rolls at the sitting of the court, according to an ascertained rotation, take their seats upon the bench, and remain there until they are permitted to retire, which is usually soon after the sitting, that they may attend to the business of their respective offices. Ibid. — 21. Two master also attend the house of peers every day it sits, and are employed by that house in carrying their messages to the house of commons, except such as relate to the royal family, which are usually carried by the judges; but such masters as are members of the house of commons do not join in executing this duty. And on the trial of a peer, or of any person impeached by the commons, all the masters attend every day. Ibid. — 22. They likewise attend coronations and processions of state. Ibid. — 23. For the convenience of the suitors and others, one master attends every day at the public office for the purpose of taking answers and affidavits, the acknowledgment of deeds, recognizances, and surrenders of offices intended to be enrolled, and other business of that kind, according to the 13 Car. 3. st. 1. Newl. 8, 9. — 24. When a person is unable, from sickness or any other cause, to come to the public office, the master attends such person at any distance from London not exceeding twenty miles. Newl. 9. — 25. Each master executes the orders of reference made to himself independently of all the other masters. Ibid. — 26. The hours of attendance in the master's office, are from ten o'clock in the morning until three in the afternoon, and from six to eight in the evening (though the evening attendance is now seldom given). The hours of attendance in the public office are particularly stated hereafter in that part which respects the clerk of this office. Ibid. — 27. The holidays kept at the master's office consist of the four vacations, viz. from the last seal after each term to the first seal before the following term; and, besides these vacations, the following particular holidays are kept in the private offices, namely, King Charles's Martyrdom, Candlemas-day, Lady-day, Ascension-day, the Restoration of King Charles II., Midsummer-day, and the Gunpowder Plot. The holidays kept in the public office are specified in that part which respects the clerk of the public office. Newl. 9, 10. — 28. Though the vacations

And by commission a judge frequently hears causes in chancery.

But if the masters in chancery disagree to the opinion of the judge, there shall be no decree; for they are equal in commission. *Semb.* 1 Ver. 265.; but it is said, that this does not appear by the decree.

A master in chancery shall not be answerable for a security approved by him, if there was no corruption in him, although it proved defective. R. 2 Ver. 90. (g)

(B 6.)

cations are understood to consist of the periods before stated, the masters attend in their offices for the accommodation of the suitors, as long after the last seal subsequent to each term, as they in their discretion may think necessary for completing or forwarding the business in their respective offices; and with that view they have attended generally from eight to twelve days beyond the period stated. Newl. 10. — 29. The salaries of the masters consist of the following particulars: of 100*l.* a-year each, payable at the exchequer under a grant from the crown subject to the usual deductions, of robe money amounting to about 6*l.* 8*s.* 10*d.* each, payable by the clerk of the hanaper, of two salaries of 200*l.* and 400*l.* making together 600*l.* a-year for each, paid out of the dividends of public annuities purchased by the court of chancery under the authority of parliament. These salaries were granted by the stat. 5 Geo. 3. c. 28. and 46 Geo. 3. c. 128. They are also entitled to considerable fees for business done in their respective offices. *Ibid.*

(f) They are appointed by the lord chancellor, and hold their offices for life. Newl. 6.

(g) 1. *Clerks to the Masters in Ordinary.*—There are attached to each office two clerks; one is the chief clerk, the other is the copying clerk. The duties of the principal clerks are to keep a register of the warrants or summonses issued from the office, and of the names of the clerks in court, and solicitors who attend the return thereof, by which register the costs are afterwards taxed; to arrange and preserve the records, deeds, books, and other documents in the office, so that they may at all times be readily found and produced when wanted; to attend the court with deeds, books, and papers; to draw and transcribe all certificates to be signed by the master, and to draw and transcribe all reports to be afterwards settled and signed by the master, and to prepare the schedules to be annexed to the reports. They are also employed in assisting the masters in making calculations. Newl. 11.—2. *Clerk of the Public Office of the Masters in Ordinary.*—It has been already stated that one master is in attendance during the whole year (certain holidays excepted), in order to administer oaths to answers and pleas, to take affidavits, to receive the acknowledgments of recognizances, deeds, and specifications of patents, and to transact other business of that kind. For the dispatch of this business, they have an office common to all the masters in rotation, called the public office, and a clerk attached to that office, called the clerk of the public office. This office was established by the stat. 13 Car. 2. st. 1. The duties of the clerk are to write the jurats and attestations upon honour to answers and pleas, and the returns to commissions, and to enter a memorandum of them in a book kept for that purpose in the office, and to preserve such records until the clerk in court, who is to file them, applies and gives a receipt for them, to write the certificate of witnesses being sworn, who are to be examined by the examiners, or before arbitrators; to write the jurats on affidavits, and the memoranda on affirmations; to make out the rotas for the masters respecting all the different attendances in the public office, in court, at the rolls, and in the house of lords; and to deliver these lists, not only to the masters, but to the deputy registers as their guide in filling up the references to the respective masters; to keep lists of all causes and petitions in the papers before the lord chancellor, master of the rolls, and vice-chancellor; and to enter the names of the consent causes and petitions in a book. Generally, he is the clerk in all matters transacted in the public office, and which regard the masters as a body. Newl. 11, 12. — 3. One master and the clerk of the public office attend there every day during the whole year, Sundays, the holidays, and the Saturdays after mentioned only excepted, viz. New Year's-day, Epiphany, King Charles's martyrdom, Candlemas-day, Lady-day, Good Friday, the Saturday following, and Monday, Tuesday, and Wednesday in Easter week, Ascension-day, Monday, Tuesday, and Wednesday in Whitsun-week, King Charles's Restoration, Midsummer-day, Saint Matthew, the King's Coronation, Michaelmas-day, King's Accession, Powder Plot, Christmas-day, and the two following days. The hours of attendance are as follow;
from

(B 6.) The register.

The register (*h*) is an officer of note, who has many deputies (*i*), who take notice of all orders and decrees made by the court. Vide Practical Register in Chancery, 254. 310.

These

from New Year's-day to the day immediately preceding the first seal before Hilary Term, from eleven to one, except Saturdays, when the office is shut; on the day preceding such seal from ten till two, and from six until eight in the evening; the two following days from ten until two only, and from thence until Saturday after the last seal after Hilary Term, from ten until two, and six until eight, except the Saturday evenings before and after term; Passion week, from ten till two; Easter week, from eleven until one; from the first seal before Easter Term until the Saturday after Easter term, the same hours of attendance as Hilary Term; from the seal before Trinity term until the Saturday after the last seal after Trinity Term, the same hours of attendance as the preceding terms; from thence to the conclusion of the sittings in court, from ten till two only; from the conclusion of the sittings until the first seal before Michaelmas Term, from eleven till one, except on Saturdays, when the office is shut; before, during and after Michaelmas Term, the same attendance as before, during and after the other terms. The hours of attendance just mentioned are of course to be understood with the exceptions to be collected from the list of holidays. Newl. 13, 14, — 4. *Masters Extraordinary in Chancery*. To assist the masters in chancery in the ministerial part of their duty, officers (called masters extraordinary in chancery) are appointed by the lord chancellor. Their principal business consists in taking affidavits, and the acknowledgments of deeds in the country, and they are restrained from doing any thing within twenty miles of London; and that it may appear whether they do or not, they are in the caption to express the name of the town and county where they shall take any affidavits, &c. otherwise the same shall not be held authentic, nor admitted to be filed or enrolled. See Beame's Ord. Chan. 212. Newl. 14.

(*h*) 1. The office of the register of the court of chancery is executed by four sub or deputy registers, besides the master or clerk of the report office, sometimes called the filer of the reports, and the two clerks of the entries. Newl. 24. — 2. The office of principal register is vacant, and the above-mentioned officers receive for their own use the fees for business done in the office. Ibid. — 3. The 45 Geo. 3. c. 75. allows appointments and nominations, which, during any vacancy of the office of register and keeper of the registry and registers, in the court of chancery of Great Britain, shall be made by the lord chancellor under his hand and seal, of any person to be a sub-register, or deputy register, or filer or keeper of the reports and certificates and books of entries of orders and decrees, or to be an entering clerk for entering orders made in said court, or to hold any office or place, the appointment, &c. to which might have been made by the person holding the office of register, &c. in case such office had not been vacant.

(*i*) 1. The four deputies attend the court when sitting, take minutes of the directions given; arrange those minutes, and draw up the decrees, dismissions, and orders. They make copies of decrees, dismissions, and orders, and sign them; and make copies of minutes for parties requiring the same. They mark exhibits proved in court *vivâ voce*, and sign certificates of various kinds. By the stat. 12 Geo. 1. cap. 32. it is the duty of the deputy registers to countersign the accountant general's drafts upon the bank of England; and to draw and sign certificates to the accountant general, preparatory to the transfer or delivery out of the stocks, securities, or other property standing in his name, or deposited in the bank in trust, in the several causes or accounts in the court, pursuant to the orders of the court for such purpose. For these duties no fees are taken or allowed to be taken by the deputy registers. The senior deputy register appears in practice to discharge certain special duties of the office himself. He files exceptions to the master's reports, enters pleas, demurrers, causes, appeals, rehearings, further directions, equities reserved, and exceptions for hearing before the lord chancellor, and makes out a book of the same; he delivers notes for subpoenas to hear judgment; he makes out a paper of causes and other matters to be heard in court, and notices, causes, and other matters that are adjourned, and sees that they are put into the paper the day they are adjourned to; he makes copies of exceptions and petitions for rehearing, and of appeal when required; he receives deposits upon filing of exceptions and bills of review, and also upon setting down petitions for rehearing and of appeal keeps an account thereof, and pays the same pursuant to the orders of the court:

These orders he ought to draw up, enter in his office, sign, and deliver to the parties. Vide Practical Register in Chancery, 254, &c.

He ought to take the orders as the court pronounces them. Vide Practical Register in Chancery, 255.

He ought to recite the first order (if there be such) in the subsequent one. Vide Practical Register in Chancery, 257.

If the order be out of a general rule, he ought to recite the reasons for making it. Vide Practical Register in Chancery, 257.

If the order be for a reference to arbitrators after the hearing, he ought to mention the opinion of the court, unless the court otherwise directs. Vide Practical Register in Chancery, 260. (*k*)

(B 7.) The six clerks.

The six clerks are (*l*) the only attornies (*m*) to the court of chancery, and

court; he also marks with the office stamp printed copies of briefs and letters patent, and tells out and tells in the same; he sets down as a privilege eight causes in each term. The next senior deputy register attends at the rolls, and has the like duties excepting as to filing exceptions, and receiving the deposits thereon, and making copies thereof, marking and telling out and telling in briefs, and excepting also that his privilege extends only to the setting down of six causes in each term. Newl. 24, 25, 26. — 2. The hours of attendance at the office are generally from ten in the morning till two in the afternoon, and from five till eight in the evening. But from the time of meeting, after the Christmas holidays, to the first day of Hilary Term, from the last seal after Hilary Term to the first day after Easter Term, from the last day of Easter Term to the first day of Trinity Term, and from the first seal before Michaelmas Term to the first day of the same term, the hours are from ten in the morning till three in the afternoon; and from the fourth seal after Trinity Term till the shutting of the accountant general's office the hours are from ten in the morning till two in the afternoon, and from five till six in the evening. When an increase of business renders it necessary, further attendance is given. Newl. 26, 27. — 3. The holidays are Martyrdom, Candlemas-day, Lady-day, Ascension-day, Restoration, Midsummer-day, King's Birth-day, from Maundy Thursday till the Monday after Easter week, the Whitsun week, Ash Wednesday, Gunpowder Plot (but, if the court sits on either of these two days, attendance is given from ten till one), Queen's Birth-day, Prince of Wales's Birth-day, Lord Mayor's-day, Saint Thomas; attendance on these days is given from ten till one; twelve days at Christmas; the long vacation commencing when the accountant general's office is shut, and ending at the first seal before Michaelmas Term. But some person is in attendance during the long vacation, excepting on the days above noted as holidays. Newl. 27.

(*k*) 1. *Register's Bag-bearer.* The duty of the bag-bearer is to attend the court of chancery at all times, when the lord chancellor or vice-chancellor is sitting with the register's book and cause papers, and to continue his attendance till the rising of the court; after which he makes out from the register's paper the several lists of causes and other matters appointed for hearing on the following day, and delivers the same in the evening preceding at the houses of the lord chancellor and vice-chancellor, at certain public offices, and at the chambers of gentlemen of the bar. Newl. 27, 28. — 2. *Register of Affidavits.* The duties of this officer are to receive, register, and file all affidavits made in causes and other proceedings in the court of chancery, to be originally used in that court, and to make copies thereof. It is also his duty, when required, to attend with the original affidavits in the court of chancery, to grant certificates of affidavits being filed, and to search for affidavits. The office is executed by a deputy, who is wholly paid by his principal. Newl. 29, 30.

(*l*) 1. *Six Clerks.* These officers are appointed by the master of the rolls, and hold their offices on the equity side of the court. Their duties are to receive and file all bills, answers, replications, and other records in all causes on the equity side of the court of chancery; and if, when brought to them for that purpose, they appear to be fairly engrossed with their proper stamps, and conformable to the rules and practice of the court, to enter memoranda of them in books from which they are to certify to the court,

court, as occasion may require, the state of the proceedings in causes. They sign all copies of pleadings made by the sworn clerks and waiting clerks, after seeing that the originals are regularly filed; after each term they present to be set down the causes ready for hearing in the ensuing term, either before the lord chancellor or the master of the rolls. They attend in Westminster-hall in term time, to read the documents required to be read in causes. They examine and sign doquets of decrees and dismissions prepared for inrolment, and see that the records and orders be duly filed and entered, which they certify previously to the presentation of the doquets to the lord chancellor, the master of the rolls, or the vice-chancellor, for signature. They have the care of all records in their office which remain in their studies for the space of six terms, for the sworn clerks and waiting clerks to resort to without fee. They afterwards sort them and lay them up in their record room in bundles, making indexes and calendars, for the more ready recourse to them. The remaining business in their office, on the equity side of the court, is transacted by the sworn clerks and waiting clerks. Instead of each six clerk employing a deputy under him (as was formerly the practice) to transact his business during the vacation, and to take care of the records in his particular division, the six clerks now employ one clerk under them all for the care of the records in every division, whereby the disturbance of the records, which is stated to have taken place under the more ancient practice, appears to be prevented. One or more of the six clerks, as the business of the office requires, attends in person during vacations. In addition to the duties on the equity side of the court, the six clerks have other duties, with which the sworn clerks and waiting clerks have no concern. They are comptrollers of the hanaper, and inrol the warrants for grants which pass the great seal. The six clerks also write and engross letters patent for sheriffs, with the writs incident thereto; and they have the custody of the sheriffs' roll. An under clerk assists his principals in the preparation of sheriffs' patents, and in other parts of their duties. The six clerks are the nominal attornies in all causes depending in the petty bag; and it is their duty to enter in a book all rules in causes given by the clerks of the petty bag. Newl. 32, 33, 34. — 2. The usual hours of attendance are from ten in the forenoon till two in the afternoon, and later as occasion requires, and in term time from six to eight in the evening. The holidays are the Epiphany, King Charles's Martyrdom, the Purification, Lady-day, unless the court sits, Ash Wednesday, Good Friday, Easter week, excepting Saturday, if it be a notice day, Ascension-day, the Restoration, Whitsun week, excepting Saturday, if it be a notice day, King's Birth-day, Midsummer-day, unless the court sits, or it be a notice day, Prince of Wales's Birth-day, St. Bartholomew, London burnt 2d of September, Coronation, St. Michael, Accession, Powder Plot, Lord Mayor's-day, Christmas-day, and intervening days to 6th of January. Newl. 31. — 3. *Sworn Clerks.* These officers are admitted to their office by the master of the rolls, and which they hold for their lives. See Beames' Orders in Chan. 280. It is the duty of the sworn clerks to make out all writs, special and common, on the equity side of the court of chancery, and all processes (excepting subpoenas) in the causes wherein they are respectively employed: all bills, pleas, demurrers, answers, replications, and other pleadings, are by them entered in their books, and presented to the six clerks to be filed; and the required certificates, as to the state of proceedings in the several causes in which they are respectively concerned, are prepared by them, and tendered to the six clerks for their signature. They make copies of all pleadings and proceedings filed with the six clerks, or returned into the office of the six clerks; and for that purpose they have a right to have recourse to, and to have the custody of, all the records in the causes wherein they are employed as occasion requires. They enter all rules to produce witnesses, and pass publication, and all appearances and consents, with the register, and sign all petitions for rehearing and of appeal, undertaking on behalf their respective clients to pay such costs (if any) as the court shall award, as to any proceedings had since the decree or order appealed from, or sought to be reheard. They are, when required, to attend the hearing of causes wherein they are concerned; and also to attend the masters in chancery on the taxation of bills of costs, and otherwise as occasion may require. They must be well acquainted with the fees of all officers on the equity side of the court; they draw and enrol all doquets of decrees and dismissions required to be enrolled; and exemplify the pleadings and proceedings of the court when required. They attend the court of chancery and the masters, and also the courts of common law and assizes, with records when required, pursuant to orders of the court of chancery; they certify to the court matters of practice when required; they answer questions stated by solicitors or suitors relative to the practice of the court, and give advice on the conduct of suits. Newl. 35, 36. — 4. A general order of the court, made June 18, 1668, regulates what proportion of the fees received by the sixty clerks of their clients shall be retained by them, and what proportion they shall be accountable

and the others (*n*) are under clerks to them. Ord. per Clarendon. Rules and Orders of Chancery 110. Vide Practical Register in Chancery, 60. (*o*)

All the proceedings, upon bill and answer, to the decree, and sometimes after the decree, belong to their office. Vide Practical Register in Chancery, 60.

Copies of the bill, answer, depositions, or other record, which belong to the six clerks to make, ought to contain 15 lines in every sheet, written plainly and fully. Ord. per Cla. Rules and Orders of Chancery, 104. Vide Practical Register in Chancery, 113.

And no such copy shall be delivered out of the office, till signed by the six clerk, or his deputy. Ord. per Cla. Rules and Orders of Chancery, 104. Vide Practical Register in Chancery, 64. 113.

accountable for to the six clerks. Upon the construction of this order it has been held that the six clerks are entitled to receive their proportion of the fees from the sworn clerk, though he may not have received them from his client, but only may have given credit for them. Newl. 36, 37.—5. They are the attorneys on the equity side of the court, and have a right to act as solicitors in it; and by themselves or their agents are to give constant attendance for the dispatch of the suitor's business. It is in the option of a solicitor to employ any one of the sworn clerks he thinks proper. In order to qualify and entitle a person to act as a sworn clerk, it is necessary that he should have served a clerkship of five years to one of the sworn clerks, who takes a fee in consideration of the same, after the expiration of which clerkship such person is qualified to be sworn in before the master of the rolls. Newl. 37.—6. For greater convenience, some alterations have been made in recent times as to the hours for transacting business. That part of the six clerks office wherein the sworn clerks transact their business, is now open during term time from ten in the morning till three in the afternoon, and from six till eight in the evening, holidays excepted. And from the last day of every term until the second seal after Hilary Term, the seal after Easter Term, and the fourth seal after Trinity and Michaelmas Terms, this part of the office is open from ten in the morning till four in the afternoon, excepting on the days appropriated for services of notices, of motions and petitions, when it is opened from ten in the morning until three in the afternoon, and from six till eight in the evening; and from the second seal after Hilary Term to the last seal after the same term; and from the first seal before each term to the first day of each term, from ten in the morning till three in the afternoon; and on the days for services of notices and petitions, from five in the afternoon till dusk. During all vacations it is open from ten in the morning till two in the afternoon, holidays excepted. In cases of emergency, attendance is given, although out of office hours, or on holidays. The holidays usually kept are as follow: King Charles's Martyrdom, the Purification, Lady-day, unless the court sits, or it be a notice day; Ash Wednesday, unless the court sits, or it be a notice day; Good Friday, Easter week, or until the notice day, if before the expiration of the week; Ascension-day, Restoration, Whitsun week, or until the notice day, if it be before the expiration of the week; King's Birth-day, but if the court sits, or it be a notice day, it is kept in the afternoon only; Midsummer-day, unless the court sits, or it be a notice day; Prince of Wales's Birth-day, Saint Bartholomew, September 2 London burnt, Coronation, Saint Michael, Accession, Powder Plot, Lord Mayor's-day, in the afternoon only; December the 25th to January the 6th, both days inclusive. Newl. 37, 38, 39.—7. *Waiting Clerks.* The service, attendance, and fees of the waiting clerks are the same in all respects as those of the sworn clerks; nor do they differ in any thing from the sworn clerks, excepting that a clerk who has served but three years to a sworn clerk, may be admitted into the office of a waiting clerk; and that a waiting clerk has no right to take any articulated clerk under him; and that two waiting clerks are allowed to one seat in the six clerks' office, whereas the sworn clerks have each of them a separate seat. Newl. 39.

(*m*) The appointment of a clerk in court is necessary only where the party is to appear. 1 Ves. j. 94.

(*n*) A six clerk cannot be changed at pleasure. 2 Ves. s. 111.

(*o*) See that formerly the six clerks were the only attorneys of the court, 13 Ves. 197.

Nor shall it be used in court, or before a master. Ord. per Cla. Rules and Orders of Chancery, 104. Vide Practical Register in Chancery, 113.

All pleadings, commissions, and certificates which belong to them, shall be immediately delivered to the six clerk, who is the attorney in the cause, or to his deputy; nor shall they, before that, be opened by any under-clerk. Ord. per Cla. Rules and Orders of Chancery, 107.

No bill, pleading, commission, or decree, shall be carried by any under-clerk out of the office, to be engrossed, copied, or inrolled (*p*): and after the engrossment, &c. the original shall be remitted to the six clerk, to whose custody it belongs. Ord. per Cla. Rules and Orders of Chancery, 107. (*q*)

(B 8.) Warden of the fleet.

The warden of the fleet is an officer of this court, and attends to receive all persons it shall commit to his custody.

Vide Imprisonment, (D).

(B 9.) Other officers.

As to the examiners. Vide post, (P 1, &c.)

As to the cursitors, and other officers. Vide 4 Inst. 82. (*r*)

(*p*) 1. After the bill is drawn and engrossed, it is to be carried to a clerk in court to be filed, who first enters it in his cause book, and then in the general bill book; after which he marks it at the top with the day of the month, and year, and subscribes his name at the bottom on the left side, and then delivers it to his six clerk to be filed, which the latter accordingly does, having entered it also in his book. Newl. 2. — 2. Bills, thus brought into the six clerks office, must be entered and filed according to their several dates. Ord. Can. 70.

(*q*) 1. A sworn, and a six clerk has a lien on the duty recovered by him. 2 Ves. s. 25. — 2. Nor is he obliged to deliver up papers till he is satisfied his fees, though the client has paid them to the solicitor, and he to the other clerk, who absconds. 3 Atk. 727. — 3. This lien extends as well to collateral proceedings as to decree. 2 Ves. s. 25. — 4. Though his claim can only be enforced by a direct application. 2 Cox, 202. — 5. The lien cannot be defeated by a voluntary release from his client. 2 Ves. s. 25. — 6. Though it may by one, upon consideration. Ibid. — 7. It does not extend to a loan from the clerk to the solicitor. 2 Atk. 114. — 8. A bill lies by a sworn clerk against the solicitor for his fees. 6 Ves. 681. — 9. And the client will be restrained from paying any part of the bill of fees, &c. due to his solicitor, until the clerk in court employed by him in the cause has been fully paid his bill. Dick. 224. 10. Under the order of 18 June 1668, regulating the office of the six clerks, they are entitled to receive their proportion of the fee from the sworn clerk, though he has given credit to the client. 5 Ves. j. 589.

(*r*) 1. *Subpœna Office*. It is the duty of the patentee of the subpœna office, by himself or his sufficient deputy or deputies, to make out, write, and engross all writs of subpœna sued out of the court of chancery sealed with the great seal. These duties are performed by a deputy, who receives a salary from the patentee, and retains to his own use part of the fees which accrue. Newl. 40. — 2. The hours of attendance at this office are in term time from eleven in the morning till two in the afternoon, and from five till eight in the evening; and in the vacation, from eleven in the morning till two in the afternoon. The holidays usually kept are, January 8, 18, 25, and 30; February 2, Ash Wednesday, March 25, Easter Monday, Tuesday, and Wednesday; April 23, May 4, and 29; Whit Monday, Tuesday, and Wednesday; June 4, and 24; July 25, August 12, 16, and 21; September 2, 22, and 29; October 25, and 26; November 4, and 5; December 21, 25, 26, and 27. Newl. 40, 41.

(C) The

(C) The jurisdiction of the chancery.

(C 1.) Ordinary, according to the common law.

In the chancery there are two courts; the ordinary, where the chancellor or keeper proceeds according to the common law (s). 4 Inst. 79. Eq. Abr. 127. (t)

The stile of this court is, *coram domino rege in cancellariâ*. 4 Inst. 80. 2 Inst. 552.

Out of this court issue all original writs. 4 Inst. 80. Eq. Abr. 128. (u)

All commissions that pass the great seal. 4 Inst. 80.

Deeds are there inrolled. 1 Rol. 372. H.

Statutes which empower the chancellor to hear and determine offences, attend this court. 4 Inst. 81, 2.

This court holds plea upon attachment of privilege, for the clerks and officers of the chancery. 4 Inst. 79, 80. 1 Rol. 371. l. 30.

In an *audita querela*, or *scire facias* in the nature of an *audita querela*, to avoid executions of the court of chancery. 4 Inst. 79. Eq. Abr. 128.

In petitions, and *monstrans de droit*. 4 Inst. 79. Eq. Abr. 128. (x)

In a *scire facias* to annul patents. 4 Inst. 79. 88. 2 Vent. 344.

In a *scire facias* upon a recognizance in this court. 4 Inst. 79. Eq. Abr. 128. (y).

Upon a statute staple, or recognizance upon the statute 23 H. 8. 4 Inst. 79. 1 Rol. 371. l. 30.

In a *scire facias* upon letters of reprisal. 1 Ver. 54.

In dowments made in chancery. 4 Inst. 79. Eq. Abr. 128.

In partitions. 4 Inst. 79.

(s) To understand the nature of this court, it is observable, that in antient times the chancellor was likewise chaplain to the king, and it was a branch of his department in the time of the justiciar to write the diplomata, that is, all charters and commissions from the king; so that when the power of the justiciar was broken, he obtained the *officina brevium et chartarum*; and from thence all the extraordinary jurisdictions touching the granting of charters, as likewise all inquests of office to entitle the crown were returned into this court; and the exchequer, in which these were antiently transacted, became only an ordinary court of the revenue, to set leases to the king's farms, and to get in the king's debts; and therefore the office in the exchequer became only an office of instruction of what lands belonged to the king in particular counties; but to vest lands in the crown *de novo*, and also to grant lands from the crown, unless they were merely farms that were granted for years, it was necessary to have an office under the great seal. 2 Rep. 16. 4 Rep. 93. Plowd. 340. Gilb. Hist. Exch. 5 Rep. 52. 10 Rep. 115. Harr. 6.

(t) Which jurisdiction has been said to be nearly obsolete. Woodes. Lect. 125.

(u) 1. Whence it is called *officina justitiæ*. Lambard's Arch. 48. — 2. And for which (and for commissions) it is always, as well in vacation as in term-time, open to the subject, who may there at any time demand and have, *ex debito justitiæ*, any writ that his occasions may call for. 3 Com. 48. — 3. These writs (relating to the business of the subject), and the returns to them were, according to the simplicity of antient times, originally kept in a hamper in *hanaperio*; and the others (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, in *parva бага*; and thence hath arisen the distinction of the hanaper office and petty bag office, which both belong to the common law court of chancery. 3 Com. 49.

(x) 8 Rep. 404.

(y) Which being entered into by order of the court of chancery are suable here only 1 Vern. 215, *et vide* Latch. 3. Cro. Car. 113.

In traverses of office. 4 Inst. 79. Eq. Abr. 128.

In debt, or trespass against the officers of the court. D. 20 H. 6. 32. b. 1 Rol. 371. l. 30.

And in all personal actions for or against such officers, and ministers of the chancery. 4 Inst. 80. Eq. Abr. 128.

But this court does not hold plea of land. D. 20 H. 6. 32. b. Eq. Abr. 128.

And therefore, where a woman sued for a jointure in the chancery of Chester, a prohibition was granted. 1 Sid. 189.

The chancellor is the sole judge in this court. 4 Inst. 80. (z)

The proceedings there are in Latin (a). Eq. Abr. 128. (b)

And are not inrolled, but remain *in filaciis*, filed in the office of the petty bag. 4 Inst. 80.

If there be a demurrer in this court, it shall be determined by the chancellor. 4 Inst. 80.

If issue be joined (c), the chancellor, &c. delivers the record with his own hand (d) to B. R. to be there tried (e): but after trial, it shall be remanded, and judgment given in chancery. 4 Inst. 80 (f). Vide 1 Rol. 372. l. 35. Vide Lat. 3. Vide infra.

And both courts are but one for this purpose. 4 Inst. 80.

After issue, a *venire* out of chancery, *quorum quilibet habeat 4 libratas terræ*, will be well. Al. 14.

And the *venire* shall be awarded in chancery returnable in B. R. Al. 14.

If the issue arises in a county palatine, Ireland, &c. the chancellor ought to deliver the record to B. R. and they write to the county palatine, Ireland, &c. to try, and return it to B. R. Lat. 3. R. per 3 J. Jon. 82. Vide 3 Bul. 305.

But the chancellor cannot write to the county palatine, Ireland, &c. to try the issue. R. Lat. 3.

Nor can he transmit the record to be tried in C. B. Lat. 3.

Yet, if the issue is to be tried by certificate, the chancellor may write to the bishop, &c. Lat. 3. Vide Jon. 83.

(z) Vide supra, (B 4.) n.

(a) Whence it has sometimes been called the *Latin* side of the court.

(b) 1. In English now, pursuant to 4 Geo. 2. c. 26. — 2. The process is under the great seal. Harr. 7.

(c) In *scire facias* out of the petty bag to repeal a charter and issue joined, the record is transmitted into the crown office of B. R., and there tried at bar. 1 P. Wms. 207.

(d) The delivery by an officer is sufficient. 2 Saund. 157. The Prince's case in 8 Rep. Rex v. The Warden of the Fleet. Harr. 7. infra in the text.

(e) There was no jury process in the antient *aula regia*.

(f) 1. Quære, whether the constant practice has not been otherwise. Vide Al. 16, 17. Styl. 84. 94. Cro. Jac. 12. 2 Rol. Ab. 349. 2 Saund. 23. 27. Harr. 7. in notis. — 2. And it is clear, that if there be a demurrer to part and issue upon the residue, the whole record shall be transmitted into B. R. and judgment be there given. 2 Saund. 23. 24. 1 Mod. 29. 1 Sid. 438. 1 Lev. 283, 284. 2 Keb. 584. 587, 588. 600. 1 Lill. 499. — 3. And the reason is, because there can be but one execution. Ibid. — 4. And if the record come thither entirely, they cannot send it back again; though it was said that the court of chancery might have given judgment upon the demurrer before the record was sent into the king's bench. Ibid. Harr. ibid. — 5. Where, however, the trial of the issue is by certificate, or any other medium than a jury, judgment shall be given in chancery. 1 Jon. 80. Lat. 3. Harr. ibid. infra in the text.

After issue tried in B. R. or in a county palatine, &c. and thither returned, B. R. shall give judgment upon it, and it shall not be remanded to the chancery. Lat. 3. Eq. Abr. 128. Vide supra.

So, though only the tenor of the record, upon which the issue was, be removed into B. R. and a trial upon it. R. Al. 17.

So if there be a demurrer for part, and issue for other part, in chancery, the whole record shall be delivered to B. R. and judgment there upon the demurrer, as well as upon the issue. R. 2 Sand. 23. Eq. Abr. 128. R. in Cha. Eq. Abr. 129.

If the record be delivered by the clerk of the petty bag, it will be well removed; for that may be said to be *propria manu* of the chancellor which is done by his officer. R. Mich. 1700. Eq. Abr. 128, 9.

Upon a judgment (g) in chancery, error lies in B. R. 4 Inst. 80. Dy. 315.

But the lord keeper said, he would award an injunction upon such a writ of error. 1 Ver. 131. (h)

But a mispleading in form there will not be prejudicial in any case, although it be in a matter where the court of chancery holds plea according to the common law. 1 Rol. 372. l. 45. (i)

(C 2.) Extraordinary jurisdiction. — Court of equity. (k) Vide post, § X.

The court of equity is not a court of record. 4 Inst. 84. 37 H. 6. 14 b. Yel. 227.

The proceeding there is by English bill. 4 Inst. 84. (l)

And it has (m) jurisdiction properly in three cases, viz. In matters of fraud. 1 Rol. 374. l. 10. Vide post, (3 F 1. — 3 M 1.)

In

(g) Which too can be given in term only. Amb. 296.

(h) But the received opinion now is that the writ of error will lie.

(i) So little is usually done on the common law side of the court, that, according to Mr. Justice Blackstone, there are no traces to be met with of any writ of error being actually brought since the fourteenth year of queen Elizabeth.

(k) The chancellor likewise exercises a jurisdiction by the provisions of various statutes.

(l) Vide infra.

(m) 1. In the antient treatise entitled *Diversité des Courtes*, supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by subpœna in chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman; no lawyer having sate in the court of chancery from the times of the chief justices Thorpe and Knyvet, successively chancellors to king Edward III. in 1372 and 1373, to the promotion of sir Thomas More by king Henry VIII. in 1530. After which the great seal was indiscriminately committed to the custody of lawyers or courtiers, or churchmen, according as the convenience of the times and the disposition of the prince required, till serjeant Pickering was made lord keeper in 1592: from which time to the present the court of chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then dean of Westminster, but afterwards bishop of Lincoln, who had been chaplain to lord Ellesmere when chancellor. 3 Com. 53. — 2. In the time of lord Ellesmere (A. D. 1616,) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the court of king's bench, whether a court of equity could give relief after or against a judgment at the common law. This

In case of accident. 1 Rol. 374. l. 10. Vide post, (Z.)

In matters of trust, or confidence. 1 Rol. 374. l. 10. Vide post, (4 W 1.) (n)

But chancery does not aid contrary to a maxim in law, unless in case of a fraud, &c. 1 Rol. 375. Q. R. Vide post, (3 F 8.)

Nor contrary to a statute. 1 Rol. 378. S. Vide post, (3 F 7.)

Though the party was ignorant that his act would have such an effect in law. 1 Rol. 374. l. 21. (o)

(D) Pro-

contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a premunire, by questioning in a court of equity a judgment in the court of king's bench, obtained by gross fraud and imposition. This matter being brought before the king, was by him referred to his learned counsel for their advice and opinion; who reported so strongly in favour of the courts of equity, that his majesty gave judgment on their behalf: but not contented with the irrefragable reasons and precedents produced by his counsel (for the chief justice was clearly in the wrong), he chose rather to decide the question by referring it to the plenitude of his royal prerogative. Sir Edward Coke submitted to the decision, and thereby made atonement for his error. But this struggle, together with the business of commendams (in which he acted a very noble part), and his comptrolling the commissioners of sewers, were the open and avowed causes, first of his suspension, and soon after of his removal from his office. 3 Com. 53, 54. — 3. Lord Bacon, who succeeded lord Ellesmere, reduced the practice of the court into a more regular system, but did not sit long enough to effect any considerable revolution in the science itself; and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I., did little to improve upon his plan; and even after the restoration the seal was committed to the earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years, and afterwards to the earl of Shaftesbury, who (though a lawyer by education) had never practised at all. Sir Heneage Finch, who succeeded in 1673, and became afterwards earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity, a thorough master and zealous defender of the laws and constitution of his country, and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations; which have also been extended and improved by many great men who have since presided in chancery. And from that time to this the power and business of the court have increased to an amazing degree. 5 Com. 54, 55.

(n) 1. And whether in these cases it has jurisdiction in relation to *foreigners and foreign matters*, see 1 Ves. j. 371. 2 Ves. j. 56. 4 B. C. C. 189. 3 Ves. 170. 431. 9 Ves. 347. (211) — 2. And though it has not an immediate jurisdiction over rights and duties arising from the state of *marriage* (which are exclusively of ecclesiastical cognizance), yet it has incidentally. 3 Ves. 352. — 3. Thus, though it has no immediate jurisdiction over a contract for separation, yet has it where a third party covenants to indemnify the husband against the wife's debts, or a fortune accrues to the wife after separation. Ibid. — 4. And in cases where equity originally had jurisdiction, it still retains it, notwithstanding a change in the doctrines or practice of the courts at law has rendered it unnecessary to the ends of equity and conscience. Vide infra.

(o) 1. The same jurisdiction is exercised, and the same system of redress pursued, in the equity court of the exchequer; with a distinction however as to some few matters peculiar to each tribunal, and in which the other cannot interfere; and first, of those peculiar to the chancery. — 2. Upon the abolition of the court of wards, the care which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feudal view, but resulted to the king in his court of chancery, together with the general protection of all other *infants* in the kingdom. When therefore a fatherless child has no other guardian, the court of chancery has a right to appoint one;

(D) Process.

(D 1.) Subpœna.

If a man commences (*p*) a suit in equity, the first process is a subpœna, introduced in the time of R. 2. Seld. 6 vol. 1544.

Which

one; and from all proceedings relative thereto, an appeal lies to the house of lords. The court of exchequer can only appoint a guardian *ad litem*, to manage the defence of the infant, if a suit be commenced against him; a power which is incident to the jurisdiction of every court of justice: but when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal indiscriminately will take care of the property of the infant. 3 Com. 426, 427. — 3. As to *idiots* and *lunatics*, the king himself used formerly to commit the custody of them to proper committees in every particular case; but now, to avoid solicitations and the very shadow of undue partiality, a warrant is issued by the king under his royal sign manual to the chancellor or keeper of his seal, to perform this office for him; and if he acts improperly in granting such custodies, the complaint must be made to the king himself in council. But the previous proceedings on the commission, to inquire whether or no the party be an idiot or a lunatic, are on the law-side of the court of chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law. 3 Com. 427. — 4. The king, as *pater patriæ*, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor; and therefore, whenever it is necessary, the attorney-general, at the relation of some informant (who is usually called the relator) files *ex officio* an information in the court of chancery to have the charity properly established. By statute also 43 Eliz. c. 4. authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lancaster, respectively to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be viewed in the respective courts of the several chancellors upon exceptions taken thereto. But though this is done in the petty bag office in the court of chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent in his answers to the exceptions may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue; and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And, as it is thus considered as an original cause throughout, an appeal lies of course from the chancellor's decree to the house of peers, notwithstanding any loose opinions to the contrary. 3 Com. 427, 428. — 5. By the several statutes relating to bankrupts, a summary jurisdiction is given to the chancellor in many matters consequential or previous to the commissions thereby directed to be issued, from which the statutes give no appeal. 3 Com. 428. — 6. On the other hand, the jurisdiction of the court of chancery doth not extend to some causes wherein relief may be had in the exchequer. No information can be brought in chancery for such mistaken charities, as are given to the king by the statutes for suppressing superstitious uses. Nor can chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property, not even in cases where he is a royal trustee. Such causes must be determined in the court of exchequer, as a court of revenue; which alone has power over the king's treasure, and the officers employed in its management: unless where it properly belongs to the duchy court of Lancaster, which hath also a similar jurisdiction as a court of revenue, and, like the other, consists of both a court of law and a court of equity. 3 Com. 428, 429. — 7. In all other matters, what is said of the court of equity in chancery will be equally applicable to the other courts of equity. Whatever difference there may be in the forms of practice, it arises from the different constitution of their officers; or if they differ in any thing more essential, one of them must certainly be wrong; for truth and justice are always uniform, and ought equally to be adopted by them all. 3 Com. 429.

(*p*) 1. A suit on the equity side of the court of chancery, on the behalf of a subject merely, is commenced by preferring a bill in the nature of a petition to the person holding

Which may be returnable on (*q*) a day certain, as *die Jovis prox' post quinden' paschæ*.

Or on a common return day, as *die paschæ prox' futur' in unum mensem*.

If Easter be passed, it shall be *die paschæ in unum mensem prox' futur'*. Vide Practical Register in Chancery, 340.

It may be returnable in the mayor's court. 1 Ver. 406.

Or in the chancery in Ireland; but then no attachment issues here for a contempt. 1 Ver. 406, 420.

A subpoena may be sued before (*r*) a bill filed. Ord. per Clarendon. Vide Rules and Orders of Chancery 94. — Cont. by the st. 4 & 5 Ann. 16. except to stay waste, or suits at law. (*s*)

The charge for one or two defendants is 2s. 6d. at the subpoena office; for three or more defendants 3s.

By the st. 15 H. 6. 4. a subpoena shall not be granted, till surety found to satisfy the party grieved his damages and expences, if the matter of the bill be not made good.

Process for contempt ought to be sued in the county, where the party resides. Per Ord. 7 Car. 1. 1 Ch. R. 56. Vide Rules and Orders of Chancery, 11.

The subpoena ought to be served before the return.

Or before noon, or the rising of the court on the day of the return. Vide Practical Register in Chancery, 343. (*t*)

A subpoena is well served, when the plaintiff or another shews the writ to the defendant, and leaves it with him. Vide Practical Register in Chancery, 341.

Or leaves the label, (*u*) or a note containing the day of appearance; for

holding the great seal; or in case he is plaintiff, or the seal is in the king's hands, to the king himself in his court of chancery. But if the suit is instituted on behalf of the crown, the matter of complaint is offered to the court by way of information given by the proper officer, and not by petition. Mitf. 6, 7. — 2. The bill must have counsel's signature, or it will, and at plaintiff's cost, be taken off the file. Ord. Ch. 93. 1 Dick. 68. — 3. Or dismissed on demurrer. Prax. Alex. 1 vol. 4. Carey, 82. — 4. Or defendant will be ordered not to answer. Carey, 93.

(*q*) 1. Subpoenas are made returnable always in term. — 2. Unless defendant lives in London, or within ten miles thereof, when the plaintiff may, upon motion or petition, with affidavit of the fact, obtain an order for a subpoena returnable immediately in the vacation. Newl. 4. — 3. Which affidavit is needless against officers of the court. Mosel. 42. — 4. In term time, it is needless to have the subpoena returnable immediately; for in term time it may be made returnable on any day, at the option of the plaintiff Newl. 4.

(*r*) Vide infra.

(*s*) 1. And, unless in the excepted cases, no contempt is incurred by disobeying a subpoena sued out before bill filed. Newl. 4. — 2. Though in practice it is a common course, taking care to have the bill on the file by the return day. Ibid. — 3. If the bill is not then on the file, the defendant, on finding this to be the case, may obtain his costs; for which purpose his clerk in court usually makes out a bill of costs, which is afterwards taxed by the master, and then entered with the register, and the payment may be enforced by subpoena and the other processes of the court; nor will the plaintiff be permitted to file his bill till he has paid his costs. Ibid.

(*t*) 1. It seems that it may be served at any time before twelve at night on the return day. 2 Burr. 812. 1 T. R. 102. Turn. & Ven. Pr. 68. — 2. And on a Sunday. Newl. 8.

(*u*) 1. The label is a small piece of paper affixed to the subpoena containing the names of defendant and plaintiff, and day of appearance. 1 Anst. 79. — 2. Where there is only one

for if there are several defendants, (x) such label, or note is left with the first, (y) the writ with the last. Vide Practical Register 341, 2. Vide Rules and Orders in Chancery, 96.

Or leaves such writ (but it is a doubt (z) when he leaves only the label, or note) with any of the family at the house of the defendant. Vide Practical Register in Chancery, 341, 2. Vide Rules and Orders of Chancery, 96.

Or leaves it at the house of his usual residence, (a) or puts it in at the window, when the defendant absconds. Vide Practical Register in Chancery, 342. Vide Rules and Orders of Chancery, 96. (b)

By an order in the exchequer, a subpoena to answer, rejoin, or hear judgment, ought to be served personally, or left at the dwelling house or residence of the defendant, with one of the family; or the writ under seal shall be shewn to such one of the family, and a ticket left with him, containing the effect of the writ; and, in a subpoena to answer, shall be written in the exchequer hand in parchment. Vide Rules and Orders in the Exchequer, 1. Rule 1.

If there are two defendants, who sue the plaintiff in a foreign court, and one of them is beyond sea; service upon the other within the realm, is good for him. Ordered upon Motion. Ca. Ch. 67. (c)

When

one defendant, the subpoena itself must be served. Ibid. 3 Atk. 567. — 3. Service of subpoena by leaving the label at a counting-house of defendant, is not sufficient, unless it be given to a partner or some acknowledged clerk there. 1 Price, 92.

(x) 1. If there be three defendants, the plaintiff, wishing to avoid the expence of three subpoenas, must have two labels to his subpoena; and must personally serve each of the two defendants with whom he first meets, with one of these labels, shewing to him at the same time the body of the subpoena under seal; and the body of the subpoena is to be served on the last defendant, in the same manner as if he were the only defendant. Newl. 5. — 2. But there cannot be more than three defendants for one subpoena; though a man and his wife are to that purpose accounted as one only. Unless the separate estate of the wife is sought to be charged; in which case, as she is considered to be a feme sole for other purposes, so she must be separately served with a subpoena. 9 Vcs. 488.

(y) 1. That is, the first that is met with; and the body of the subpoena under seal, is, at the same time, shewn to him. Newl. 5. — 2. The writ itself is left with the last. Supra text. 3 Atk. 567.

(z) 1. Any objection of this sort is waived by appearance. Harr. 104. — 2. Unless it be on the eve of the long vacation, and the defendant chose rather to appear than be liable to an attachment; in which case he is still at liberty to insist upon not having been served at all, or that he was irregularly served. 3 Atk. 567.

(a) 1. Service at the last known place of residence will not be sufficient, if he has left it for a year and upwards. 2 Vern. 369. — 2. A copy of subpoena left with a servant of defendant's brother, (who was also his partner and a co-defendant in the suit) at whose house such servant acknowledged that he resided, will be good service, although the party be out of the kingdom at the time. 3 Price, 176. — 3. But, in general, service by leaving subpoena at defendant's counting-house will not be sufficient, unless it be given to a partner, or some acknowledged clerk there. 1 Price 92.

(b) 1. Writ placed hanging upon, or put under the door, or in at window, and afterwards coming to defendant's hands, is good service, where he refuses to open the door. Harr. 104. — 2. Service by sending the subpoena to the defendant under cover to the person to whom he had directed his letters to be sent, ordered to be good service. 5 Ves. 147.

(c) 1. So service upon one defendant who was agent and late partner of another defendant abroad, was ordered to be good service on the latter, in a bill to stay proceedings at law. Bunb. 107. Dick. 26. 39. 102. Vide 1 S. & L. 238. — 9. So in the case of two partners defendants, and one abroad. 1 Mad. 187. — 3. But the substitution of service on a person to whom defendant, residing out of the jurisdiction, had given a power of attorney to act for him in the management of his affairs, was refused.

When a defendant was beyond sea, (*d*) a subpoena *ad audiendum judicium* was served upon the clerk in court, by order of the court upon motion. (*e*)

If a man sues a *feme covert*, a subpoena shall go against the husband and wife. (*f*)

refused. 1 S. & L. 238. Vide infra note (*e*), *sub fine*. — 4. Service upon the parent of an infant will be ordered to be good. 2 Atk. 70. 1 Dick. 18. 77. — 5. Thus, their father in law. 8 Ves. 141. — 6. So that leaving a subpoena with the turnkey of a prison shall be service on a prisoner at large. Newl. 6. Ibid. 85. Vide Mosel. 237. — 7. If the defendant is a close prisoner, such service is good without motion. Ibid. — 8. Though in both cases, personal service, if feasible, is to be preferred. 2 Madd. Tr. 200. — 9. But no process can be served upon a prisoner committed at the suit of the crown, without leave. Turn. & Ven. Pr. 70. Pr. Reg. 403. — 10. But an agreement between a mortgagee and mortgagor, authorizing two attorneys, not parties, to receive a subpoena for the mortgagor, in a bill to be filed for a sale or foreclosure, will not be sufficient to induce the court to order service of subpoena upon them, to be good. Ibid. 90, 91. Dick. 579. — 11. If a bill be filed against a corporation, the process must be served upon some one of the members. Hind. 87. Newl. 7. — 12. And if he refuses to appear to and answer the bill, the next process is against the corporation itself, namely by writ of *distringas*, *alias pluries*, and thereupon sequestration. — 13. Upon the first *distringas*, the sheriff generally levies forty shilling issues; upon the *alias distringas*, four pounds; and upon the *pluries distringas*, he levies the whole property. Hind. 140.

(*d*) 1. Service of the subpoena abroad is good. 4 B. C. C. 213. — 2. So in Scotland. 2 Dick. 587. 18 Ves. 496.

(*e*) 1. It seems, however, that there must be an affidavit of merits. 4 Vcs. 359. 3 Mad. 350.; *sed vide* 3 B. C. C. 24. — 2. Made by the plaintiff, not by his solicitor. 3 Mad. 350. — 3. But it is not necessary that the affidavit upon which the order is applied for should state a previous application to the attorney to accept a subpoena, and a refusal by him. 13 Vcs. 595. — 4. A subpoena was served upon the attorney of parties executors. Dick. 26. — 5. And an order was made, that service of the writ to answer an amended bill, upon the clerk in court or solicitor, should be good service upon the special circumstances, that though he had not been served with a subpoena, he had appeared on two motions; that his answer would be very important; that he lived abroad out of the jurisdiction; and would not appear, to answer. 6 Ves. 171. — 6. But where a defendant having appeared and answered the original bill, the plaintiff afterwards amended it, at which time the defendant was out of the jurisdiction; the court refused to order service upon the clerk in court in the original suit, to be taken as good service on the defendant. 2 Cox, 389. — 7. In a cross cause, service upon the clerk in court in the original cause, is good. 4 B. C. C. 478 *sed vide* Dick. 776. — 8. But where the plaintiffs in the original cause were many, several of them out of the jurisdiction, and some peers, a motion that service on the clerk in court should be good, was refused. 3 B. C. C. 429. Dick. 776. — 9. The plaintiffs however were prevented from proceeding in the original cause, till they had answered in the cross cause. Ibid. — 10. So a motion was refused for serving subpoena, to revive, on defendant's clerk in court in the original cause. Dick. 545, 546. — 11. Where a party is avoiding service, and the clerk in court is dead, the proper course is to move first that service of a subpoena to name a clerk in court, or the solicitor, may be good service; and if none is named, then that service on the solicitor may be good service. 12 Vcs. 2. — 11. Service of a subpoena for costs, the clerk in court being dead, and the suit abated, and no other proceeding to be had but to recover the costs on the solicitor for the surviving defendant, was ordered to be good. Dick. 166. — 12. Where parties are beyond the jurisdiction of the court, substitution of service will be refused. 3 B. C. C. 386. — 13. So it was refused, where one defendant resided out of the jurisdiction, and the other admitted by his answer that he had a power of attorney from him to receive the arrears (then due) of an annuity, which it was the object of the bill to set aside. 2 Mer. 459. Vide supra note (*c*).

(*f*) 1. Vide supra. — 2. But it seems that service on the wife alone is not good service on the husband. Vide Gilb. For. Rom. 41. — 3. Delivering the body of the subpoena to defendant's wife at his dwelling-house, which she threw down, and the solicitor afterwards thrust under the door, was considered to be sufficient service for the purpose of shewing cause against a decree. Dick. 596.

Excerpt

Except where the husband is out of the kingdom, or other special cause.

If the subpœna be shewn to the husband, with notice that it is also against his wife, it is sufficient for both. Vide Practical Register in Chancery, 343. (g)

But shewing the writ, without leaving it, or the label or note, is not sufficient, except where the defendant refuses it. Vide Practical Register in Chancery, 343.

A subpœna for costs must be served upon the person; for the costs ought to be demanded. Vide Ord. per Cla. Rules and Orders of Chancery, 95. Vide Practical Register in Chancery, 344.

But upon affidavit that the person cannot be found, the court, upon motion or petition, will order a service upon the clerk in court. Vide Ord. per Cla. Rules and Orders of Chancery, 95. Vide Practical Register in Chancery, 344.

Yet, though the service be not sufficient for an attachment, it may be sufficient for costs, if the defendant takes notice of it, and the plaintiff does not file his bill. Vide Practical Register in Chancery, 343.

A counterfeit subpœna does not oblige. Vide Practical Register in Chancery, 17.

And whoever serves it, if he knows it, misbehaves himself, and an attachment goes against him.

So he, who serves a subpœna upon a different person, unless it be by mistake.

Or misbehaves himself in the service. Vide Practical Register in Chancery, 99.

Or abuses, or is guilty of a contempt on him who serves it (h). Vide Practical Register in Chancery, 99.

If the plaintiff does not proceed in the cause for a year, he ought to have another subpœna *ad faciendum alternatum*. 1 Ver. 172. Vide Practical Register in Chancery, 350. (i)

A sub-

(g) 1. Carey, 92. Toth. 10, 11. — 2. An application to serve two persons, named by a mortgagor for that purpose in an indorsement upon the mortgage, with a subpœna to appear to a bill filed by the mortgagee against the mortgagor, to foreclose, the mortgagor having been out of the kingdom so long as not to come within the act of 5 G. 2. (passed to render process effectual against persons who abscond, *vide infra*) was refused. Dick. 579.

(h) 1. Hence a defendant was ordered to stand committed, unless cause to the contrary was shewn, for ill-treating the person serving him with the subpœna. Dick. 477. — 2. So likewise for assaulting a deputy messenger of the court in discharge of his duty. 1 Mer. 302. — 3. And in the former case it was ordered, that leaving the order *nisi* at his house, should be good service. Dick. 477. — 4. The same holds where defendant uses scandalous or contemptuous words against the court or its process. — 5. And by lord Clarendon's order, a single affidavit of defendant having used contemptuous words against the court or its process, shall be sufficient to ground an attachment, whereupon he shall be brought in to be examined, and if the misdemeanor shall be confessed or proved against him, he shall stand committed until he satisfy the court touching his said misdemeanor, and pay the prosecutor his costs; and if he shall not be thereof found guilty, save by the oath of the party who made such affidavit, he shall be discharged, but without any costs in respect to the oath made against him. Ord. Can. 116. — 6. And where an affidavit by two witnesses is made of such contempt, or where oath is made (which by construction must be by two witnesses likewise, 3 Atk. 218.) of the party having been assaulted, defendant is to be committed on motion, without further examination. — 7. In all questions of contempt, the court exercises a discretion. 1 V. & B. 297. — 8. And always looks to the party's motives. 17 Ves. 61.

(i) 1. On amended bill, it is not necessary to serve a new subpœna. Dick. 108. 1 Ves.

A subpoena issues for various causes; as, *ad respondendum*. Vide the Form. West Chan. sect. 21. Vide Practical Register in Chancery, 339.

Ad testificandum at the assizes, or upon a commission, &c. West s. 34, 42, 49, &c. Vide Practical Register in Chancery, 347.

For costs. West s. 21. Vide Practical Register in Chancery, 344. Vide Rules and Orders of Chancery, 95.

For the delivering or producing of evidences, or other writings. West. s. 44, 5. Vide Practical Register in Chancery, 346.

Ad rejungendum, or *ad audiendum judicium*. Vide Practical Register in Chancery, 346. 349. Vide Rules and Orders of Chancery, 94, 5. Vide West s. 30, 37.

The penalty of 100*l.* in the subpoena mentioned, is only *in terrorem*, and shall not be levied, though the defendant does not appear. 10 H. 7. 4, 5. (k)

(D 2.) Let-

1 Ves. j. 250. 4 Ves. 66. — 2. And therefore where a bill is amended, and the plaintiff amends the defendant's copy of the bill, there is no occasion to serve the defendant with a subpoena to answer the amendment, to put the matter in issue. Dick. 108. — 3. And when defendant is in contempt for want of his answer, and puts in an answer which is reported insufficient, it is not necessary to serve him with a subpoena to make a better: the plaintiff may immediately go on with the process where he left off. Dick. 379. — 4. Provided he has not accepted costs. 1 V. & B. 324. 331.

(k) 1. For making process effectual against persons who abscond, and cannot be served therewith, or who refuse to appear, the 5 G. 2. c. 25. s. 1. provides, that if in any suit in equity any defendant against whom process shall issue, shall not cause his appearance to be entered according to the rules of the court, in case such process had been served, and affidavit shall be made that such defendant is beyond the seas, or that upon enquiring at his usual place of abode, he could not be found so as to be served, and that there is just ground to believe that such defendant is gone out of the realm, or absconds to avoid being served, the court may make an order appointing such defendant to appear at a day therein to be named, and a copy of such order shall, within fourteen days, be inserted in the London Gazette, and published on some Lord's Day after divine service in the parish church where such defendant made his usual abode within thirty days before his absenting; and a copy shall, within the time aforesaid, be posted up, viz. a copy of such order made in chancery, exchequer, or duchy chamber, shall be posted up at the royal exchange, and a copy of every such order made in any of the courts of equity in the counties palatine, or of the great sessions in Wales, shall be posted up in some market town, within the jurisdiction of the court; and if the defendant do not appear within such time as the court shall appoint, then on proof made of such publication of such order as aforesaid, the court may order the plaintiff's bill to be taken *pro confesso*, and make such decree thereon as shall be just: and the court may order such plaintiff to be paid his demands out of the estate, &c. sequestered, according to the decree, such plaintiff giving such security to abide such order touching the restitution of such estate as the court shall make upon the defendant's appearance, and paying such costs as the court shall order; but in case such plaintiff shall refuse to give security, then the court shall order the estate, &c. sequestered, or whercof possession shall be decreed to be delivered, to remain under the discretion of the court until the appearance of the defendant to defend such suit. — 2. And by s. 2. if any defendant by virtue of any *habens corpus*, or other process of any court of equity, shall be brought into court, or refuse, &c. to enter his appearance, or to appoint a clerk in court, such court may appoint a clerk in court to enter an appearance for such defendant. — 3. By s. 3. if the person against whom a decree shall be made, upon refusal, &c. to enter his appearance, shall be in custody or forthcoming, so that he may be served with a copy of such decree, then he shall be served with a copy thereof, before process shall be taken out to compel the performance thereof. — 4. And by s. 4. if any decree shall be made in pursuance of this act, against any person out of the realm, or absconding, and such person shall within seven years return or become publicly visible, he shall likewise be served with a copy of such decree, within a reasonable time after his return shall be known to the plaintiff; and in case any defendant against whom such decree shall be made, shall within seven years happen to die before his return, or shall die in custody

eustody before his being served with a copy of such decree, then his heir, if such defendant shall have any real estate sequestered, or whereof possession shall have been delivered to the plaintiff, or the husband, guardian, or committee of such heir, or if the personal estate of such defendant be sequestered, or possession thereof delivered, then his executor or administrator may be served with a copy of such decree, within a reasonable time after it shall be known to the plaintiff that the defendant is dead, and who is his heir, executor, or administrator, or where they may be served. — 5. And by s. 5. if any person so served shall not within six months after such service appear and petition to have the cause re-heard, such decree shall stand absolutely confirmed against such person, his heirs, &c., and all persons claiming under him by any act subsequent to the commencement of such suit. — 6. By s. 6. if any person served with a copy of such decree shall, within six months after such service, or if any person not being so served shall within seven years after the making of such decree, appear in court and petition to be heard with respect to the matter of such decree, and pay down or give security for such costs as the court shall think reasonable, the person so petitioning or any person claiming under him by any act done before the commencement of the suit, may be admitted to answer the bill, and issue may be joined, and witnesses examined, and such other proceedings had thereon, as might have been in case the party had originally appeared. — 7. But by s. 7. if any person against whom such decree shall be made, his heirs, executors, or administrators, shall not within seven years after the making such decree, appear and petition to have the cause re-heard, and pay or give security for such costs as the court shall think reasonable, such decree shall stand confirmed against the persons against whom such decree shall be made, their heirs, &c.; and all persons claiming under them by any act done subsequent to the commencement of such suit. — 8. By s. 8. this act shall not make good any proceeding against any person beyond the seas, unless it shall appear to the court by affidavit, before the making such decree, that such person had been in England within two years next before the subpoena issued. — 9. And by s. 9. this act shall not make good any proceeding against any person in any court of equity having a limited jurisdiction, unless it shall appear to such court by affidavit, before the making such decree, that such person had resided within the jurisdiction of such court within one year next before the subpoena issued. — 10. Previous to which statute, if on original bills, or bills of revivor, the defendant did not appear, but stood out all process of contempt, the bill could not be taken *pro confesso*; but if he appeared, and then stood out for want of an answer, it might. 2 Freem. 127. Ch. Rep. 65. — 11. To obtain an order for taking the bill *pro confesso* under the statute, there must be an affidavit of defendant's absconding to avoid process. 2 Cox, 84. — 12. And it is not sufficient that the party making the affidavit swears, that he was informed and believes that the defendant has withdrawn himself in order to avoid being served with the process of the court; but it must likewise be sworn by whom the party deposing received such information. Barn. 401. 403. Dick. 401. — 13. The affidavit also must state, that the defendant has been in England within two years before the subpoena. 5 Ves. 1. 113. — 14. If, when an order is made to take a bill *pro confesso*, the defendant moves to discharge it on payment of costs, and offers to put in an answer, the court, it seems, will see what answer is proposed to be put in. 11 Ves. 77. — 15. But if the delay has been extravagantly long, they will not interfere. 2 B. C. C. 279. — 16. Where an order has been made for taking the bill *pro confesso*, merely putting in an answer is not sufficient to set it aside. 2 B. C. C. 279. — 17. And where a party is in custody for not putting in his answer, and a motion is made to take the bill *pro confesso*, it is not sufficient to produce a certificate, that the answer is upon the file, unless there has been a payment or tender of costs; but if the plaintiff has taken an office copy of the answer, it cannot be treated as a nullity. 11 Ves. 202. — 18. If there be no more defendants than one, and all the process for contempt has issued, the bill may, on motion, be taken *pro confesso*; but if there are more defendants, the cause must be set down. 3 Ves. 372. — 19. And the bill may be taken *pro confesso* against one defendant, and there may be a complete decree against the others. Dick. 59. — 20. After two insufficient answers to an information, an order may be obtained to set down the cause, in order that the information should be taken *pro confesso*. 3 Ves. 209. — 21. Where the defendant is in a distant prison, and does not appear, the court will not order the bill to be taken *pro confesso* for want of an appearance, without a *habeas corpus*, though it be suggested that the demand is so small, that it will not bear the expence of bringing him up. 3 Atk. 690. — 22. And where defendant, having been removed by *habeas corpus* from the king's bench to the fleet prison, for contempt in not putting in his answer, and having procured himself to be afterwards recommitted to the king's bench, in order to prevent an *alias pluries*, it was ordered that the bill should be taken *pro confesso* against him, in default of his putting in his answer by the time at which an *alias pluries* might have issued. 2 Mer. 511. Dick. 535. — 23. Where the defendant has

has appeared to and answered the original bill, if he cannot be found to be served with a subpoena to answer the bill of revivor, plaintiff must proceed under the act of 5 G. 2. to have the bill taken *pro confesso*; to which the statute is applicable. 2 B. C. C. 127. Dick. 135. — 24. As it likewise is to supplemental bills, &c. Dick. 293. — 25. It extends likewise as well to cases where the party has been served with the former, but hath avoided the subsequent process, as to cases where it has been impossible to serve the party with any process at all. 1 Cox, 104. 1 B. C. C. 388. — 26. Though an amended bill cannot be taken *pro confesso* as to the matter of the amendment. Dick. 475. — 27. But it may be taken *pro confesso* generally. 4 Ves. 619. — 28. And where the bill is amended after answer; if the amended bill is not answered, the plaintiff is entitled to a decree that the bill be taken *pro confesso* generally. 4 Ves. 619. — 29. And if the suit abates and the defendant (though a defendant in the original cause), absconds to avoid being served, the st. 5 G. 2. must be pursued, as if he had been a new defendant. Dick. 63. — 30. And where defendant was served with a subpoena to appear, but not appearing, an attachment issued against him for his contempt; on his absconding to avoid being attached, the court ordered him to appear by a certain day, under the statute. Dick. 662. — 31. A bill may be taken *pro confesso*, though an answer is put in, if it is reported insufficient, it being then as no answer. 4 Vin. Abr. 446. 2 Atk. 24. 3 Ves. 209. Vide 2 P. Wms. 556. Contra. Vide Dick. 316. — 32. Or although there is a demurrer to the bill which is over-ruled. Harr. 154. — 33. Or although there is a sufficient answer to the bill, if the bill is afterwards amended, but no answer put in to the amendments; in which case the bill will be taken *pro confesso* generally, and not as to the amendments only, the record being entire. 4 Ves. 619. — 34. And to prevent this decree, not only must the answer be put upon the file; a receipt must be given for the costs; if it is not, a motion should first be made, that the answer should be taken off the file for irregularity. 11 Ves. 202. 2 B. C. C. 279. — 35. But this motion will not be granted if the plaintiff has taken an office copy of the answer. Ibid. — 36. The process to obtain a decree *pro confesso* is not applicable to a prisoner in Newgate under a criminal sentence; who, if brought up by *habeas corpus*, must be remanded immediately, and cannot, as in civil cases, be turned over to the Fleet *cum causa*, subject to the farther process by *alias, habeas corpus*, &c. 1 V. & B. 306. — 37. The decree for taking the bill *pro confesso* is pronounced by the court, the plaintiff not being entitled to take such a decree as he can abide by, as in the case of default by the defendant at the hearing. 8 Ves. 192. — 38. This decree, when made in the ordinary course after appearance, is just the same as any other decree of the court, and cannot be impeached collaterally, but only upon a bill of review, or a bill to set it aside for fraud. 13 Ves. 563. — 39. Defendant being outlawed, a motion that he might appear within a limited time, upon the equity of the statute, was granted, though he had not been in the kingdom for two years before the subpoena. 2 Ves. j. 188. — 40. But the statute it seems does not apply to defendants labouring under incompetency, as idiocy or the like. 2 S. & L. 292. — 41. Upon a motion to discharge an order to take the bill *pro confesso* on payment of costs, and an offer to put in an answer, the court required to see what answer was proposed to be put in. 11 Ves. 77. — 42. And quare whether the form of the application should not be for leave to answer. Ibid. — 43. An order having been obtained by plaintiff, that the clerk in court might attend at the hearing of the cause with the record of the bill to have it taken *pro confesso* against one of the defendants (the others having put in their answers, which had been replied to), this defendant afterwards put in his answer, and thereupon moved to discharge the order. The court refused to discharge it on motion, but reserved the consideration of the matter to the hearing. 1 Cox. 413. — 44. Bill having been taken *pro confesso* under the act, the defendant was allowed to put in his answer, and bring on the cause to be heard on terms. Dick. 70. — 45. By 45 G. 3. c. 124. s. 4. in case any defendant having privilege of parliament, shall stand out a return of process of sequestration issued against him for not putting in an appearance to any bill in equity for enforcing discovery and relief, or discovery alone, then such court may, upon producing the return of such sequestration, on the application of the plaintiff, appoint a clerk in court to enter an appearance for such defendant; and such proceedings may be thereupon had as if the party had actually appeared. — 46. And by s. 5. when any defendant having privilege of parliament shall have appeared to any bill filed against him seeking a discovery upon oath, or when an appearance shall have been entered for him, according to the provisions aforesaid, and such person shall not put in his answer within the time allowed by the rules of such court, then it shall be lawful for the court, upon the application of the plaintiff, to order that such bill shall be taken *pro confesso*, unless the defendant shall, within eight days after being served with such order, shew good cause to the contrary. — 47. And by s. 6. when any such order shall have been pronounced for

(D 2.) Letter to a peer.

If the defendant be a peer (*l*), a subpœna does not go, but a letter (*m*) from the chancellor, requiring him to take a copy of the bill, and to answer at (*n*) such a day. West. s. 21. 2 Vent. 342. Vide Practical Register in Chancery, 341.

But if he do not answer upon the letter, then a subpœna shall issue. 2 Vent. 342. Vide Practical Register in Chancery, 341.

If he do not appear upon the subpœna, then an order shall be awarded to shew cause why a sequestration should not go. 2 Vent. 342.

And if no cause be shewn, a sequestration goes. 2 Vent. 342.

So, by the st. 12 & 13 W. 3. 3. process against a peer, or member, &c. during time of privilege, shall be by letter, or subpœna, as usual, and on leaving a copy of the bill at the defendant's house, or last place of abode, if he do not appear, or answer, or perform not the order, decree, &c. a sequestration of real and personal estate shall go, as in case of a peer before.

But no process for a contempt shall issue against a peer. 2 Vent. 342.

And therefore an attachment does not go. Seld. 6 vol. 1543.

(D 3.) Attachment.

If the defendant (*o*) does not appear (*p*) at the return of the sub-

for taking such bill *pro confesso*, such bill shall be read in any court of law or equity, as evidence of the matters therein contained, as if such facts had been admitted by the answer of the defendant, and shall be received in evidence of the same facts, and on behalf of such persons, as the answer of the defendant to said bill might have been. — 48. The act, it has been held, is confined to cases where the bill is filed for discovery only. 17 Ves. 368. — 49. Though the contrary has since been determined, and that it extends to bills praying relief. 1 Mad. 626. — 50. And where a member of parliament refuses to enter an appearance, the court will appoint a clerk in court to enter an appearance for him under this statute. 16 Ves. 436.

(*l*) 1. Process, 8 Ves. 601. — 2. And the privilege being privilege of peerage, not of parliament, attaches upon Scotch and Irish peers, though they be not lords of parliament, or members of the house of commons. Id. 1 V. & B. 419. 8 Ves. 601. — 3. Injunctions therefore or other processes, not so accompanied, will be ineffectual. 1 V. & B. 419. — 4. So formerly it was the privilege of a defendant, member of the house of commons, to be served with an office copy of the bill together with the subpœna. — 5. But now this privilege is taken away by 47 G. 3. c. 40. — 6. And is frequently waived by peers.

(*m*) 1. It gives the party suing it out priority of suit. Bunb. 124. — 2. It must be delivered to the defendant, or left at his house, with an office copy of the bill signed by the six clerk. — 3. It is obtained by a petition to the chancellor. — 4. And the right is very ancient. 1 V. & B. 421. — 5. An injunction or other process not so accompanied will be ineffectual. 1 V. & B. 419.

(*n*) 1. Upon affidavit of the defendant's residence within ten miles of London, the lord chancellor will desire his immediate attendance. — 2. And where the question was raised, whether a peer who lived in the country, and was there at the time of being served with a letter missive, and a subpœna to appear to the plaintiff's bill, both houses of parliament being at that time convened and assembled, should be considered to be in town, the chancellor was of opinion that he should. Dick. 744.

(*o*) 1. Application for an order to direct the attorney general, as such, to appear to the bill, refused. Dick. 729. 2 Ves. 729. — 2. Nor can process of contempt be issued against him. *Davidson v. Attorney General*, 2 Mad. Tr. 203.

(*p*) 1. Vide *supra*, (D 1.) in notes. — 2. A defendant to a bill, though not served with process, may appear gratis, and refer it for impertinence. 2 B. C. C. 279. — 3. If an answer is put in the same day on which an attachment, for want of an answer, issues, the attachment has precedence. 1 Mad. 551.

pœna (*q*), and the bill be filed (*r*), the plaintiff upon an affidavit (*s*) positive and certain of the time and place (*t*) of service, and of the time of the return, shall have an attachment. Vide Practical Register in Chancery, 20. (*u*)

If the affidavit be filed before the return (*x*) of the attachment, it is sufficient. 1 Ver. 172. (*y*)

But an attachment shall not be prayed till the day after costs day. Vide Practical Register in Chancery, 8.

And the affidavit ought to shew, that the service, being within London, or twenty miles distance, was above four days past exclusive. Vide Practical Register in Chancery, 20.

If beyond twenty miles distance, that it was above eight days. Vide Practical Register in Chancery, 20.

And that he served the subpœna, or saw the service of it. Vide Practical Register in Chancery, 342.

Or that the defendant confessed himself to have been served. Vide Practical Register in Chancery, 342. (*z*)

(*q*) Order for defendant to appear to bill, under special circumstances, enlarged for three months. Dick. 74.

(*r*) 1. By 4 Ann. c. 16. s. 22. no subpœna or process for appearance shall issue out of any court of equity, till the bill is filed (except in cases of bills for injunction to stay waste, or to stay suits at law), and a certificate thereof brought to him who usually makes out subpœnas or other process in the several courts of equity, under the hand of the officer who usually files bills; for which certificate he shall receive no fee. Vide supra (D 1.) in notis. — 2. An attachment for non-appearance cannot, it seems, be taken out before the bill is entered in the bill-book, though filed in the six clerks office. 1 Ves. 53.

(*s*) 1. And not otherwise. 8 Ves. 357. — 2. Nor is a recital in an order for time obtained by defendant, sufficient. 3 Atk. 619. — 3. Since, though formerly affidavits might be filed before the return of an attachment; Dick. 76. — 4. Yet, in future, this practice of issuing an attachment, without an affidavit previously filed, in opposition to orders of the court, will be corrected. 8 Ves. 357. — 5. Affidavit before a master extraordinary in Ireland, has been read in the court of chancery. Dick. 90. Vide *Id.* 150. — 6. Affidavit in one cause, that defendant could not be found, is not sufficient for an order to serve the clerk in court in another cause, though between the same parties. Dick. 150.

(*t*) 1. In one case where service of a subpœna to appear was on defendant in Scotland; being out of the jurisdiction of the court, the propriety of issuing an attachment was doubted, though thought by the master of the rolls and most of the practitioners to be regular. Dick. 587. — 2. But the rule now is, that such service is sufficient to found an attachment. 18 Ves. 496. — 3. And by the same reason service in foreign parts. 4 B. C. C. 213.

(*u*) 1. Which writ, with the cause of its issuing, must be entered in the register's book. Ord. Chan. 46. — 2. In the case of a peer, if after service of the letter missive, and afterwards of a subpœna, no appearance is entered, a sequestration will be ordered without any of the mesne process of attachments, &c. which are directed only against the persons, and therefore cannot affect a lord of parliament. 3 Blk. Com. 445. — 3. No process in respect of a contempt can be obtained by a plaintiff being *in formâ pauperis*, until it is signed by the six clerk who acts for the pauper, and who is himself answerable if any needless or vexatious use is made of the process. Ord. Ch. 125. — 4. The writ of attachment must be made returnable in term, and there must be fifteen days between the teste and return of the different writs anterior to a sequestration, or to taking a bill *pro confesso*, unless the defendant lives within ten miles of London; in which case an order may be obtained, on motion or petition, to make the several processes of contempt returnable immediately. Newl. Harr. 117.

(*x*) Where an attachment is returnable within eight days after the Purification, eight entire days are meant. 1 Mer. 243.

(*y*) Vide supra in notis. 8 Ves. 357. contra.

(*z*) The practice of personal service, as a foundation for process of contempt, dispensed with under circumstances; a party declaring that he would not execute an order, and absconding to avoid it. 12 Ves. 203.

By an order in the exchequer, an attachment goes, if the defendant does not appear the next day after service, where the process is returnable *immediatè*, upon the second day after, if returnable at a day certain, and upon the fourth day after, if upon a common return. *Vide Rules and Orders in the Exchequer, 2. Rule 4.*

If the husband appears, and not his wife, an attachment goes against both. *Vide Practical Register in Chancery, 18. 343. (a)*

The attachment requires the defendant to answer for the contempt, as well as to the matters objected. *V. West. s. 22. Vide Practical Register in Chancery, 20.*

And it lies *(b)* for any contempt *(c)* as, for *(d)* not answering, or for answering insufficiently. *(e)*

For refusal *(f)* to obey an order *(g)* or decree. *(h)*

For abusive usage, or words of the process, or officers *(i)* of the court. *(k)*

(a) 1. *Dick. 76. Vide 6 Ves. 432. — 2. If a bill be brought against baron and feme, and she alone be taken by process of contempt, she may enter an appearance for herself alone. 1 Wils. 267.*

(b) 1. Defendant in custody under sentence for felony cannot be brought up by *habeas corpus*, upon an attachment for want of an answer. *3 Ves. 471. 573. — 2. And a defendant in Newgate under a criminal sentence, having been brought up by habeas corpus for not putting in his answer, and remanded to Newgate, it was made a quære as to the further proceeding. 15 Ves. 179. — 3. Though in a later case it was ordered, that he should be turned over to the Fleet, and then carried back to Newgate with his cause. 1 V. & B. 78.*

(c) 1. There are three sorts of contempts; scandalizing the court itself; abusing parties concerned in causes here; and prejudicing mankind before the cause is heard. *2 Atk. 469. — 2. Hence if the printer of a newspaper inserts a paragraph, tending to prepossess the minds of people as to proceedings in chancery, the court will commit him for a contempt. 2 Ves. 520. Vide etiam Dick. 794. — 3. But on submission, payment of costs, and giving up the author, it will discharge him. Ibid. — 4. The lord chancellor declared, that in future, if he should receive a private letter on the subject of a cause, he would consider whether the writer should not be committed. 8 Ves. 467. — 5. Printing an order of court, appointing a receiver, and reciting the material facts in the cause, and distributing it among the tenants, merely to prevent their paying their rents improperly, till a receiver was appointed, is not a contempt, though it is a practice to be condemned. 2 Atk. 488. — 6. It is a contempt to proceed at law after the subject of the suit has been attached in chancery. 1 B. & B. 318.*

(d) 1. Discharging insolvent debtor after receipt of *habeas corpus*. *Dick. 89. — 2. Not paying money under an order. 4 B. C. C. 89. 12 Ves. 325. — 3. And, therefore, after an order upon a party in the cause, for nonpayment of money, the proper course is an attachment; and upon the return to that, an order for commitment. 12 Ves. 325. — 4. Though the court have refused to commit a prisoner for non-payment of money, as a close prisoner, for a further contempt. 4 B. C. C. 89. — 5. Negligence in a solicitor towards his client. 3 Atk. 568. — 6. Breach of franchise. *Dick. 354. — 7. Acts of violence in the register's office. 8 Ves. 535.**

(e) 1. Motion to commit upon a fourth insufficient answer was refused; the plaintiff not having a report of the insufficiency of such fourth answer, though the defendant had filed a fifth answer. *Cooper, 262. — 2. And if a husband, by menaces, prevails with his wife to put in an answer contrary to her belief, it is a contempt. 2 Atk. 50.*

(f) If a defendant attends the hearing of a cause, and is present when the decree is pronounced, and does any act in contravention to it, he is guilty of contempt, and shall be punished for it, though the decree is not drawn up. *3 Atk. 564.*

(g) Master having made his report of what was due from tenant for rent; on affidavit of service of the report, and of demand and non-payment of the rent, the tenant was ordered to stand committed. *Dick. 183.*

(h) 1. Where the decree is for debt and costs, an attachment for the debt alone is good. *2 Anst. 390. — 2. And a subsequent attachment for the costs is good likewise. Ibid. — 3. For the purpose of commitment under a short order to pay money, the person serving the order must have authority to receive the money. 19 Ves. 117.*

(i) 1. It is a contempt to disturb sequestrators in possession. *9 Ves. 356. — 2. If an answer is put in the same day on which an attachment for want of an answer issues, the attachment has precedence. 1 Mad. 551.*

If upon a copy served and the writ shewn, the person speaks with contempt, before he knows the contents, or from what court it issued, it will be a contempt. R. Mod. Ca. 43.

For the revocation of a submission to an award made in court by consent. 1 Ca. Ch. 185.

For not performing an award made upon a reference by rule of court. Vide Arbitrament, (D 1.) (l)

And where the contempt is by abusive words against the process of the court, an attachment goes without a hearing. 1 Sal. 84. (m)

If the contempt be confessed, or proved (n) it shall be referred to the master to tax the costs of the prosecutor; and the party offending shall be committed till he pays them, and gives satisfaction to the court for the misdemeanor. Rules and Orders in Exchequer, 16. Rule 40. (o)

But if the master be in doubt what report to make, he may be afterwards examined upon interrogatories. Per Cur. P. 2 Anne.

If the contempt be by abusive actions, the offender shall be committed upon an affidavit, without other examination. Ord. per Cla. Rules and Orders of Chancery 116. (p)

As, by beating, &c. the person who serves the process. Ord. per Cla. Rules and Orders of Chancery, 116.—So in the Exchequer. Rules and Orders in Exchequer, 16. Rule 40. (p)

If by contemptuous words, he shall be committed upon two affidavits without other examination. Ord. per Cla. Rules and Orders of Chancery, 116.—So in the Exchequer. Rules and Orders in Exchequer, 16. Rule 40. (p)

And one affidavit is sufficient to have an attachment, upon which he shall be discharged, if there be no more proof, and the contempt be denied; but he shall not have his costs in respect of this affidavit. Ord. per Cla. Rules and Orders of Chancery, 116.—So in the Exchequer. Rules and Orders in Exchequer, 16. Rule 40. (q)

In B. R. interrogatories shall be exhibited in four days, or the party shall be discharged. Mod. Ca. 73.

If the contempt be apparent, he shall answer in custody. Mod. Ca. 73.

Otherwise, upon a recognizance. Mod. Ca. 73.

(k) Such abuse must be a contempt of the court, for otherwise chancery has no cognizance of a libel. 2 Atk. 469. Vide supra, (D 1.) in notis.

(l) Where there is a non-performance of an award, the proper motion is, that the party stand committed, and the service must be personal. 3 B. C. C. 358.

(m) Vide supra, (D 1.) in notis.

(n) 1. Where a person against whom an attachment is prayed in K. B., by his affidavit fully denies the charge on which the rule for an attachment was granted, the court always refuses the attachment, without entering into the credit of the parties, or the probability of the evidence; and leaves the defendant exposed to the penalty of being indicted for perjury. But in chancery the proceeding is different, for there they examine the defendant on interrogatories, and also examine witnesses on both sides, and then decide upon the truth of the charge. Doug. 516.—2. A waiver of irregularity in process by appearance does not relate back, so as to bring the defendant into contempt for not appearing in time. 1 Anst. 76.

(o) 1. It is a general rule, that parties must clear their contempt before they can be heard. 9 Ves. 173.—2. Touching which interrogatories will be exhibited. Dick. 83.—3. But a copy of them will be refused. Dick. 355.

(p) Vide supra (D 1.) in notis.

(q) As to the proceeding by attachment in courts of law, vide supra, tit. Attachment. And

And if he denies upon the interrogatories, he shall be discharged, though he may be indicted for perjury. Mod. Ca. 73.

If the defendant be taken for a contempt, he shall appear *de die in diem* in the register's office to be examined upon interrogatories. Vide post, (D 6.) Vide Practical Register in Chancery, 101.

And this, upon motion, is referred to a master; but it is usually done by the examiner. Vide Practical Register in Chancery, 102, 3.

If the defendant comes in gratis, he shall give notice of his appearance to the clerk on the other side. Vide Practical Register in Chancery, 103.

And if interrogatories are not framed within eight days, he shall be discharged, with costs to be taxed by a master.

So, if, being examined, there shall be no reference of the examination, nor commission taken on the other side, nor witnesses examined for proof of the contempt, within a month. Vide Practical Register in Chancery, 103.

If the interrogatories go to matter not contained in the affidavit, or order, the defendant may demur, or refuse to answer to them. Ord. per Cla. Rules and Orders of Chancery, 114.

And if the contempt be not proved, the defendant shall be discharged upon motion, with costs.

If the contempt be by abusive words, &c. he may be committed directly.

So, if after appearance, he departs without examination, upon motion and certificate of the departure, and of the interrogatories. Rules and Orders of Chancery, 113. Vide Practical Register in Chancery, 103.

So, if he be found in contempt. Ord. per Cla. Rules and Orders of Chancery, 113.

The register shall give the certificate of the departure; the examiner, that interrogatories are exhibited. Vide Rules and Orders of Chancery, 113. Vide Practical Register in Chancery, 103.

And he shall not be discharged, until he performs the order and pays the costs; and though he be cleared, he shall not have costs. Ord. per Cla. Rules and Orders of Chancery, 113. Vide Practical Register in Chancery, 104.

The master upon the reference of the examination, or proof of the contempt before him, shall certify, without more, the costs to be paid of either party. Ord. per Cla. Rules and Orders of Chancery, 115. Vide Practical Register in Chancery, 106.

If the contempt be denied, or be not apparent upon the examination, the prosecutor shall have a commission of course; but the defendant shall have one commissioner, and cross examine the witnesses. Ord. per Cla. Rules and Orders of Chancery, 114. Vide Practical Register in Chancery, 104.

But he cannot examine the witnesses, but by leave of the court upon special points, which the plaintiff may cross examine. Ord. per Cla. Rules and Orders of Chancery, 114. Vide Practical Register in Chancery, 104. (r)

(r) In great contempts, the court will give leave to examine witnesses to falsify the party's examination, and to the party to examine witnesses to falsify his denial of the contempt. Bunb. 244.

If the contemptors are aged, servants, &c. a commission shall go into the country, at the charge of him who prays it, to be executed when and where the six clerk, not in the cause, upon hearing of the clerks on both sides, shall appoint. Ord. per Cla. Rules and Orders of Chancery, 115. Vide Practical Register in Chancery, 105.

An attachment, and all process for contempt, shall be made out into the county where the party is resident: if he resides in London, it shall be directed to the sheriffs there. Ord. per Cla. Vide Rules and Orders of Chancery, 112. Vide Practical Register in Chancery, 111. (t)

Whoever sues any process for a contempt, ought to endeavour the execution of it; otherwise he shall lose the benefit of it, and pay costs. Ord. per Cla. Rules and Orders of Chancery, 112, 113. Vide Practical Register in Chancery, 112.

The court will discharge an attachment or other process of contempt, when it issues irregularly, with costs to be taxed by the six clerks, without motion. Ord. per Cla. Rules and Orders of Chancery, 112, 113. Vide Practical Register in Chancery, 111.

But the defendant ought to pay the costs of the process, which issued regularly, first. Ord. per Cla. Rules and Orders of Chancery, 112. Vide Practical Register in Chancery, 111.

If the sheriff do not return the attachment, a day shall be given for it. Vide Practical Register in Chancery, 110, 111. 334.

And, if he do not make a return on such day, he shall be amerced. Vide Practical Register in Chancery, 110, 111. 334.

So, if he make a false return. Vide Practical Register in Chancery, 334.

So, in the exchequer, he shall be amerced 40s. if he does not return it by the sealing day, upon a rule given the last day of the term. Rules and Orders in Exchequer, 17. Rule 46.

So, if a sheriff or under-sheriff be served with a copy of an order under the seal of the court; upon affidavit thereof, and a warrant from a baron, he shall be in contempt. Rules and Orders in Exchequer, 17. Rule 44.

The plaintiff pays 2s. 10d. for the attachment; to the sheriff 2s. 4d. and for the return 4d.

If the king dies after the arrest upon an attachment, and then the sheriff returns *cepi corpus*, it will be well, and the subsequent process upon it regular. 1 Ver. 400.

If the sheriff returns *cepi corpus*, a messenger (u) shall (x) be sent (y) for the defendant. 1 Ver. 116. 154. 344. 400.

But

(t) 1. Vide tit. Attachment.—2. The writ must be made returnable in term, and there must be fifteen days between the teste and the return, in proceeding to a sequestration, or to take a bill *pro confesso*, unless the defendant live within ten miles of London, and then an order may be obtained, by motion or petition, to make the several processes of contempt returnable *immediatè*. Hind. 100.

(u) 1. Formerly the court allowed messengers to those particular jurisdictions only, where the sheriff had the amerciaments; and they were sent in those cases, because as the sheriff might disobey the writ with impunity, there was no other way left to do justice to the plaintiff. Harr. 119.—2. However, the rule now is to send a messenger into every county generally without any restriction. 2 Atk. 507. 1 Vern. 116, 154. 2 P. Wms. 301. 2 B. C. C. 181. 7 Ves. 230. Newl. 12.—3. And though the court has refused a messenger, where the distance has been very considerable, as two hundred miles.

But this is a new officer subordinate to the serjeant at arms. 1 Ver. 344.

And the proper course, after a *cepi corpus* returned, is a motion, that the defendant enter his appearance and be examined within four days, otherwise that he may stand committed; for after a *cepi corpus*, no other process of contempt issues. 1 Ver. 344. (2).

If, after an arrest upon an attachment, and a *cepi corpus* returned, the defendant escapes out of the kingdom, a serjeant at arms shall be granted, and, upon return, a sequestration. 1 Ver. 344.

If (a) the defendant appears, being personally served, upon the attachment, and files his (b) answer, or demurrer, the attachment shall be discharged of course (c), on payment of 20s. costs, or tender and refusal

miles. Wy. Prac. Reg. 392. — 4. Yet in a late case where a defendant, residing in the county palatine of Lancaster, was attached for want of an answer, and *cepi corpus* was returned by the sheriff; it was determined that the next proceeding was to move for a messenger upon the return of *cepi corpus*, and afterwards for a sequestration. 3 Mad. 114.

(x) 1. After *cepi corpus* returned, the plaintiff cannot move that the sheriff may bring in the body, but only for a messenger, and afterwards for a serjeant at arms. 2 B. C. C. 181. — 2. And therefore, where a defendant residing in the county palatine of Lancaster was attached for want of an answer, and *cepi corpus* was returned by the sheriff; it was held, that the next proceeding was to move for a messenger upon the return of *cepi corpus*; and afterwards for a sequestration. 3 Mad. 114. — 3. So on a return to an attachment for want of appearance of *cepi corpus*, but from illness and infirmity she could not be removed, a messenger was ordered. 7 Ves. 230. — 4. A defendant having filed an answer and demurrer after a *cepi corpus* returned, on an attachment for not answering an order for a messenger, obtained before the demurrer and answer (of which the plaintiff had bespoken an office copy), had been taken off the file, was discharged with costs. Swanst. 189.

(y) 1. Upon motion; which, upon the production of the writ and return, is of course. — 2. Where the sheriff returned *cepi corpus* to the attachment, for want of appearance, but from illness and infirmity the defendant could not be removed, a messenger was ordered. 7 Ves. 230. — 3. A defendant having filed an answer and demurrer, after a *cepi corpus* returned on an attachment for not answering, an order for a messenger, obtained before the demurrer and answer, of which the plaintiff had bespoken an office copy, had been taken off the file, was discharged with costs. Swanst. 189.

(z) 1. The messenger having taken the defendant into custody by virtue of the order of the court, the latter will be committed to the Fleet prison, unless he clears his contempt; that is, till he enters his appearance, or puts in his answer, or plea, according to the nature of the contempt, and pays or tenders the costs incurred by it; upon his doing this, he will be entitled to his discharge. Ord. Ch. 113. — 2. An insufficient answer is considered as none. 1 Cox, 343. — 3. Where an infant is attached for want of an answer, in order to get rid of the attachment, the course is to order a messenger to bring the infant into court, to have a guardian assigned. 9 Ves. 12.

(a) 1. Attachment not discharged, though order for time had been obtained. Service of a copy of the order not being good service, unless the production of the original is dispensed with by the opposite party. Cooper, 282. — 2. Discharge by habeas corpus from commitment under an attachment for breach of a writ of execution of a decree for payment of money, on account of a devastavit, as executor, committed before, though not ascertained by the report, or decreed to be paid till after the time fixed by an insolvent act, of which the party had taken the benefit. 16 Ves. 376.

(b) Defendant in custody for want of his examination, discharged immediately on putting it in; but if on reference it proves insufficient, the plaintiff not having accepted the costs, may proceed from the last process, 18 Ves. 287.

(c) 1. A defendant taken upon the process for want of an answer, is, on putting in an answer, and depositing a sum for costs, entitled to be discharged, without waiting for the report that it is sufficient. 4 B. C. C. 296. 16 Ves. 478. Vide Dick. 133. — 2. Therefore notwithstanding exceptions. 4 B. C. C. 212. — 3. So without waiting for the report that it is sufficient. 16 Ves. 478. — 4. Nor can he be detained till further

sal (*d*). Ord. per Cla. But said, that he shall not be discharged without motion or petition. Ord. per Cla. Rules and Orders of Chancery, 113. Vide Practical Register in Chancery, 112. (*e*)

Upon payment of 10s. if the subpoena was not served upon the person.

And if the plaintiff sues other process, after tender of the costs, the defendant shall be discharged with costs. Ord. per Cla. Rules and Orders of Chancery, 113. Vide Practical Register in Chancery, 112.

If the contempt be pardoned, the defendant may appear and proceed, as if there had been no process. Ca. Ch. 238.

If the defendant be taken on the attachment, he shall be bailed. Vide Practical Register in Chancery, 110. (*f*)

And the attachment may be superseded. (*g*)

Or, if it be irregularly obtained, it shall be discharged upon motion. (*h*)

(D 4.) Attachment with proclamation.

If the defendant be not taken, or does not appear upon the attachment, the plaintiff shall have an attachment with proclamation. Vide Practical Register in Chancery, 101, 296. (*i*)

The charge to the office is 2s. 10d. To the sheriff, 2s. 4d. For the return, 4d.

So, by order in the exchequer, if the defendant does not appear upon the return of the attachment. Vide Rules and Orders in Exchequer, 2. Rule 5.

If the defendant be arrested upon a proclamation, a commission of rebellion, or by a serjeant at arms, where the first process was not duly executed, the plaintiff shall pay costs. Per Order 7 Car. 1. 1 Ch. R. 57.

answer, though exceptions allowed. Id. 223. — 5. If however plaintiff has not accepted the costs, he resumes the process where it stopped; if costs have been accepted, he begins again. 2 V. & B. 372. 18 Ves. 287.

(*d*) 1. Where defendant was in custody for contempt in not putting in a better answer; having put in an answer, he applied to be discharged, which was ordered, no exception having been taken to the second answer. Dick. 133. — 2. So defendant, until a fourth insufficient answer, is entitled to be discharged immediately on putting in a further answer, without waiting the report upon the reference of the exceptions, and though the costs have not been accepted. 11 Ves. 151. — 3. A defendant in contempt for not putting in his answer, may be brought up on any day in term. 1 Price, 62.

(*e*) 1. A party under a regular commitment cannot be heard except on petition. 16 Ves. 259. — 2. Though held that a motion may be made without consent, by a defendant in custody upon an attachment for want of an answer, for a commission to take his answer, &c. 3 Mad. 41. — 3. Upon an order that a defendant should be released from the Fleet, on payment of the costs of his contempt, or a tender of the same, the warden of the Fleet must release him, on an affidavit of the tender of the costs. 1 Mad. 109.

(*f*) Vide supra, tit. Bail.

(*g*) Where a writ has been improvidently issued, if within the controul of the court (either as not having gone out of the custody of the officer, or as having been returned) it shall be quashed; if beyond its controul, it shall be superseded. 1 S. & L. 75.

(*h*) Defendant in contempt ordered to be committed; but not being to be found, a sequestration issued; and the sequestrators having returned *nulla bona*, liberty was given to execute the warrant of commitment. Dick. 31.

(*i*) 1. The writ, like an attachment, must be entered with the register. — 2. It is obtained from the clerk in court, on the attachment (indorsed *non est inventus*), being left with him. — 3. And he leaves it with the bag bearer of the six clerks office to be sealed.

Vide

Vide Rules and Orders of Chancery, 12. Vide Practical Register in Chancery, 112.

If the defendant appear upon the proclamation, and file his answer, plea, or demurrer (*k*), he shall be discharged upon payment of costs, double to the costs upon an attachment, without motion; and if the plaintiff afterwards proceed, he shall pay costs.

If the defendant be taken, he shall be committed to the Fleet. Vide Practical Register in Chancery, 101.

(D 5.) Commission of rebellion.

If the defendant be not taken, or does not appear upon the proclamation, the plaintiff shall have a commission of rebellion. Vide the Form, West. s. 24. Vide Practical Register in Chancery, 94. 101. — So by order in the exchequer. Vide Rules and Orders in the Exchequer, 2. Rule 5. 19. Rule 51. (*l*)

This commission shall be directed to the sheriff. Vide Practical Register in Chancery, 94. (*m*)

Or, to special commissioners named by the plaintiff. Vide West. s. 23, 4. Vide Practical Register in Chancery, 94. (*n*)

If the commissioners permit the defendant to escape (*o*), they may be committed, till they produce him. Vide Practical Register in Chancery, 95. (*p*)

If the escape be with their consent, till they pay the debt. Vide Practical Register in Chancery, 95.

If the defendant be rescued, the rescuers may be committed. Vide Practical Register in Chancery, 95.

If A. says, that he is the person named in the writ or commission against B., by which means the commissioners take him, an attachment lies against him. Semb. Hard. 323.

But, if the commissioners take a wrong person, an action lies against them for the false imprisonment. Hard. 323.

Though he acknowledge himself to be the person. Hard. 323.

If the commissioners take the defendant they may bail him, or not, at

(*k*) 1. The first contempt on the first attachment is expiated by a tender of costs. Form. Rom. 71 — 2. But in case of an attachment with proclamations returned, a motion, founded on an affidavit of the cause of delay, is requisite before a commission to answer can be made, or a plea or demurrer admitted. Ord. Can. 99.

(*l*) A defendant against whom the serjeant at arms was ordered to go, for not producing deeds pursuant to a decree, being a lodger and keeping himself locked up, except on a Sunday, so that the serjeant at arms could not execute his warrant, and the plaintiff being, as it was supposed, without remedy, applied by motion that a commission of rebellion might issue to commissioners, who can break locks, &c.; but the application was denied, the writ being one which, if warranted, issues of course. Dict. 693.

(*m*) 1. And semble may be executed on a Sunday. 1 Atk. 57. Wy. P. R. 50. — 2. And force used. For. Rom. 76.

(*n*) 1. Which is the present practice. Newl. 76. — 2. The writ is under the great seal, and commands the commissioners to attach the defendant, wheresoever he shall be found in Great Britain, as a rebel and contemner of the law, so as to have him in chancery on a certain day therein named. Ibid.

(*o*) Having taken him. Toth. 381.

(*p*) Toth. 58. 40. 381.

their discretion. 1 Ch. R. 261, 2 (q). Vide Practical Register in Chancery, 95. (r)

If they refuse bail, they ought to bring him up to the court directly, without delay. 1 Ch. R. 262 (s). Vide Practical Register in Chancery, 95.

And a bailiff, who acted contrary, was committed for the contempt, and paid costs to the defendant. 1 Ch. R. 262.

If the defendant be taken upon a commission of rebellion, which issued irregularly, the defendant shall have costs. 1 Ver. 269. (t)

But, if an action at law be brought, an injunction goes; for it ought to be examined in chancery. R. 1 Ver. 269. (u)

(D 6.) Serjeant at arms.

If the defendant be not taken upon the commission, a serjeant at arms (x) shall (y) be sent for him. Vide Practical Register in Chancery, 101. 332. (z)

By

(q) 1 H. Bl. 468.

(r) Commissioners, therefore, under a commission of rebellion, have it in their discretion to take bail of a person for not performing a decree. Dick. 7. 1 Carey, 261.

(s) They having no right to keep him in prison. 1 H. Bl. 468.

(t) The non-entry with the register of either attachment or proclamations, is an irregularity. Hind. 122.

(u) So if any irregularity is alleged to happen in executing this process, the court will not suffer the commissioners to be sued at law for it, but will itself enquire into and punish the offence; for a court of law will not allow the commission of rebellion, though it issued regularly, to be a justification. 1 Vern. 269. Newl. 77, 78,

(x) Who, though an officer of the house of lords, is bound by himself, or his deputies, styled messengers, to execute all warrants against any person after he has stood out a commission of rebellion. Newl. 78.

(y) In the 7 Geo. 1. disputes had arisen between the serjeant at arms and the warden of the Fleet, touching the execution of the process of the court, the serjeant complaining that the court had of late, for contemnors not appearing to be examined on accounts before the master, not producing writings, and other contempts, granted orders of commitment without issuing the process against them; and that the court of late frequently gave the defendants further time to answer, on entering their appearances with the register; and that thereupon, for not answering at the time limited, orders of commitments had been granted, and the said several orders of commitments had been executed by the warden of the Fleet, or else he had returned *non est inventus*, upon which sequestration had been obtained; by which means the process of the court was rarely carried on by the serjeant at arms; it was therefore ordered, that no sequestration can regularly issue to sequester the estate of any person, who cannot be found but upon the return *non est inventus* of the serjeant at arms, and where any person was in contempt, either for want of appearance or answer, or for not yielding obedience to any order of this court, unless it was for contemptuous language, or beating or abusing any person in serving the process of this court, or other contempt of the like nature, the serjeant should apprehend and bring the contemner to the bar of the court, to answer such contempt. Beames' Ord. Chan. 323. Newl. 80, 81.

(z) 1. Motion is the usual course to obtain this process. Form. Rom. 77. — 2. Though petition will do. Dick. 285. Newl. 78. — 3. And on making it, the commission of rebellion must be delivered to the register; and the clerk in court named, if so required. — 4. The order for the serjeant must be delivered to himself or his deputy. Ord. Can. 199. — 5. Nor can an order drawn up and passed, nor the contempt thereon, be discharged without the serjeant's certificate that his fees have been paid. Ibid. — 6. After the order has been delivered to the serjeant or his deputy, he procures a writ or warrant thereon, signed by the lord chancellor. Newl. 79. — 7. And if the party against whom this process issues, be taken upon it, he is to be brought to the bar of the court to answer the contempt of which he has been guilty. Ibid. — 8. But paying costs of

By an order in the exchequer, if the defendant does not appear upon the return of the commission of rebellion, there shall be such other proceedings, as the court, upon motion, shall direct. Rules and Orders in Exchequer, 2. Rule 5.

If (a) he appears, all costs for the contempt shall be paid, before any other proceeding on his part shall be allowed; as 10s. for every person named in the attachment, for every one in the proclamation 20s. for every one in the commission of rebellion 2l. 13s. 4d. Vide Rules and Orders in Exchequer, 2. Rule 5. 19. Rule 51.

And all costs shall be paid in court by the plaintiff or defendant, or their respective attorney, before appearance or answer. Vide Rules and Orders in Exchequer, 3. Rule 5.

If the sheriff returns *cepi*, and the defendant is not brought into court, upon a rule of four days, upon motion, a messenger shall be sent for the defendant. Vide Rules and Orders in Exchequer, 3. Rule 5. (b)

By an order in the exchequer, upon process of contempt in London or Middlesex, there shall be six days between the teste and the return; in other counties, within sixty miles, ten days; in all others, fifteen days, if the court does not direct process returnable *immediatè*. Vide Rules and Orders in Exchequer, 3. Rule 5.

If there be a debate, whether the process for the contempt was served, there may be a commission for the examining it. 2 Ca. Ch. 100.

If the defendant appears and pays costs for his contempt, and afterwards is again in contempt for not making a sufficient answer, the process of contempt continues against him (c); but when he pays for all contempts, there shall be a deduction of so much as he paid upon the former contempts. Vide Rules and Orders in Exchequer, 7. Rule 16.

Process of contempt continues, and does not begin again *de novo*. Per Rule of North. Ca. Ch. 238. (d)

If the defendant be in custody for his contempt, he shall be brought to the court upon a *habeas corpus*, and charged with the bill; if he does not then answer, he shall be a second time brought to the court by *habeas corpus*, and charged with the bill, or by rule of court; and if still he does not answer, the bill shall be taken *pro confesso*. Vide Rules and Orders in Exchequer, 8. Rule 18.

of contempt, and entering appearance or putting in answer (without ascertaining its sufficiency) entitles to a discharge from a caption on this process. Vide 2 Ves. 110. 16 Ves. 418. — 9. But if ultimately the answer is reported insufficient, the process may be continued, as if no answer had been put in. Ibid.

(a) If the defendant cannot be found by the serjeant at arms, he makes return *non est inventus*. Newl. 80.

(b) And an assault upon a messenger or deputy messenger of the court, in discharging his duty, will be punished as a contempt. 1 Mer. 302.

(c) 1. Order for a messenger for want of an answer; defendant put in an answer which was reported insufficient, which being considered as no answer, the messenger was ordered to proceed to execute the former order. 1 Cox. 343. — 2. So, where an order was made that the defendant should within four days put in an answer to interrogatories, or in default a serjeant at arms should go against him, and he put in an insufficient answer, the serjeant was, upon motion, directed to take him. 1 Mod. 527.

(d) 1. Therefore a serjeant at arms will be sent after a defendant who secretes himself from the messenger. Dick. 68. — 2. So after process to a serjeant at arms issued, but not executed, answer and exceptions submitted to by a note between the clerks in court, but no farther answer being put in, the serjeant at arms was ordered to go. 16 Ves. 417. — 3. So, goods sequestered being insufficient to answer a duty decreed, the serjeant at arms was revived. Dick. 130. 443.

If a person in contempt be put to answer upon interrogatories, to excuse his contempt, he shall be committed to the Fleet, unless he gives a recognizance in 100*l.* (or more if the case requires it) to appear *de die in diem* to be examined, and not to depart without licence of the court. Rules and Orders in Exchequer, 15. Rule 38.

If upon examination he denies the contempt, or it does not appear; if the court, upon motion, be informed of a fact that can demonstrate it, the prosecutor may examine witnesses to it, in court, or by commission, upon notice to the defendant or his attorney, who may cross examine them. Rules and Orders in Exchequer, 15. Rule 38.

If there be such a commission, the defendant shall have a day to appear till the return; and if it be not returned within a week after the day for the return, he shall be dismissed with costs, and his recognizance shall be vacated. Rules and Orders in Exchequer, 15. Rule 39.

If the prosecutor does not exhibit interrogatories within four days after appearance, the defendant shall be dismissed with costs. Rules and Orders in Exchequer, 15. Rule 38.

If process of contempt be (e) not executed, it will abate by the death of the king, and the plaintiff shall begin *de novo*. 1 Ver. 300. Vide Abatement, (H 38.) — Contra by the St. 1 Ann. 8. (f)

(D 7.) Sequestration. Vide post, (Y 4.)

If (g) the serjeant at arms cannot take the defendant (h), or if he es-

(e) If an error is committed in the title of this or of any other of the processes, and the defendant puts in his answer after such erroneous process has issued, the court will then rectify such mistake. Dick. 136. Newl. 80.

(f) Serjeant at arms not granted under a four day order to bring in books, &c. before the master, until made absolute by a subsequent order upon the master's certificate of the same date. 14 Ves. 180.

(g) 1. Sequestration is the first process against peers or members of parliament; hence, where they are infants. 2 Ch. Ca. 163. — 2. But an attachment must be actually sealed and entered, though never executed, to ground a sequestration upon. Gilb. Form. Rom. 67. Newl. 86. 87. — 3. The mode of prosecuting it is to obtain an order *nisi* (upon affidavit of facts) in the first instance; which order, at the expiration of eight days, will be made absolute. — 4. And service of the order on the clerk in court, where defendant cannot be met with, will be ordered to be good service. 5 Ves. 115. — 5. So an order *nisi*, for sequestration against a privileged person, may be served on his clerk in court. 3 Anst. 647. — 6. Though, in ordinary cases, service of a writ of execution upon the clerk in court, will not be sufficient. 8 Ves. 319. — 7. An order having been made against the defendant for a sequestration for non-performance of the decree, an application was made to discharge the order for irregularity, the defendant by his affidavit positively denying that he had been served with the order *nisi*. The court, however, would not discharge the order, but stayed the sequestration for a fortnight, to give the defendant an opportunity of complying with the directions of the decree, by executing certain deeds, &c. 2 Cox, 47. — 8. Time for shewing cause, in the case of exceptions to answer put in before order *nisi* is made absolute, will be enlarged, till its sufficiency is ascertained. 3 Atk. 739. Vide 2 P. Wms. 385. 8 Ves. 87. — 9. Sequestration is the first process against the warden of the Fleet. Mos. 238. — 10. This process may be also obtained, as the first process against a contumelious defendant after an attachment, if he be already in custody, either in that or in any other suit. Newl. 82. — 11. If the defendant is not in the custody of the warden of the Fleet, but in some other custody, the plaintiff must first remove the defendant by habeas corpus from such custody, in order that he might be turned over to the warden of the Fleet, for the purpose of grounding an order for a sequestration. 2 Dick. 711. Newl. 82. 2 Anst. 579. — 12. But if the defendant be already in the custody of the warden of the Fleet, the court will grant a sequestration against the defendant immediately. 8 Ves. 314.

capes,

capas, and persists in his contempt (*i*), a sequestration (*k*) shall be awarded for the lands or goods of the defendant at the time of his contempt. Vide Practical Register in Chancery, 101, 329.

A sequestration is the necessary process of the court. Ca. Ch. 93. Though introduced by Lord Bacon. 1 Ver. 421. (*l*)

And may be awarded against the land (*m*) and goods (*n*) of the defendant. Ca. Ch. 92.

But it shall not be granted upon petition. Ord per Cla. Rules and Orders of Chancery, 123. (*o*)

(*k*) See the reasons for suing out a sequestration against a defendant who is one of the sworn clerks of the court, for not putting in his answer, instead of applying first, as was formerly the practice, for an order to suspend him. Dick. 635.

(*i*) As in not producing deeds. Dick. 326.

(*k*) 1. Which is a writ issuing out of the court of chancery and directed to four or more commissioners, empowering them to enter into the defendant's real estates, and to sequester into their own hands, not only the rents thereof, but also all his goods, chattels, and personal estate whatsoever, to keep the same till the defendant has fully answered his contempt. Newl. 18. — 2. As to the form of the order for a sequestration, see 1 Cox, 194. — 3. And note, that order of sequestration made upon the return to a single *distringas*, issued under a decree for payment of costs, is *nisi* in the first instance. 3 Mer. 543. — 4. So order of sequestration for want of answer is *nisi* in the first instance. 11 Ves. 43. — 5. A mistake in the title of the order, by omitting the words 'and others,' will be rectified by inserting them. 2 Mer. 395. — 6. So the writ itself being made out following the title of the order for the serjeant at arms, and the commission of rebellion, the titles of which were mistaken, the mistake was amended. Dick. 135. — 7. A *distringas*, under a decree for payment of costs, being to appear and answer contempt merely, not *ad comparendum et solvendum*, but the cause for which it issued being specified by indorsement, is regular. 3 Mer. 543.

(*l*) 1. The courts of common law appear formerly to have been of opinion that courts of equity had no authority to issue this process; for in 41 Eliz. it was held by the court of king's bench, that if a man be sued in a court of conscience, and will not obey, his body is to be imprisoned, and no commission ought to be awarded for the taking of his goods. Cro. Eliz. 651. Newl. 83. — 2. And it appears to have been ruled that if a man kill a sequestrator in the execution of such process, it is no murder. Gilb. For. Rom. 78. Newl. 83. — 3. And though sanctioned in lord Bacon's time, yet sequestrations were then but sparingly used in process. Newl. 83. — 4. Now, however, whether considered as mesne process, or after a decree, they are the established processes of the court. Newl. 83.

(*m*) The sequestrators should keep the defendant actually out of possession. 1 Ves. jun. 86.

(*n*) 1. Once it was made a *quære* whether choses in action are liable under a sequestration. 4 Ves. 735. Toth. 173. — 2. And therefore, whether a court of equity will give any relief to a judgment creditor, as against the money of the debtor in the public funds. 2 Cox, 235. — 3. But it is now settled that it will not. 1 B. & B. 387. 390. — 4. So that dividends of bank stock being choses in action, cannot be sequestered. 1 B. & B. 387. — 5. And hence the common rule that stock is not liable to the payment of debts, during the life of the proprietor, in any other way than by his own specific charge, or under a commission of bankruptcy or an insolvency. 15 Vcs. 577. — 6. Though standing in a trustee's name. 2 B. & B. 233. — 7. And debts are in the same predicament. 2 B. & B. 233. — 8. And see as to the difference in the effect of a sequestration between rents payable by tenants, and funded property. 1 B. & B. 390. — 9. But a sequestration lies against a pension to A. and his assigns, payable at the treasury, when in the hands of the assignee. 1 B. & B. 387. — 10. Though a salary to an equerry to one of the royal family is not a subject of sequestration. 1 Cox, 315. — 11. So an equity of redemption cannot be taken in execution, under the statute of frauds. 3 B. C. C. 478. 1 Ves. 1. 431. — 12. So money in the hands of a trustee cannot be touched by equitable any more than by legal process. 2 Anst. 381.

(*o*) 1. But on motion only. — 2. And the counsel who moves for it has the warrant from the serjeant at arms, with the return, in his hand. Newl. 18. — 3. The supposition of law is, that the prior process is filed before the subsequent process issues. 3 Atk. 569. — 4. The days within which this writ is made returnable, mean entire days. 1 Mer. 245.

If before the sequestration awarded, the defendant have conveyed his land (*p*) by covin, the sequestration shall be awarded against the defendant and his assigns. 2 Ca. Ch. 44.

And the person, to whom the land is assigned, may be taken upon the sequestration. 2 Ca. Ch. 44.

So, if land be settled, with a power of revocation, it will be subject to the sequestration. 1 Ca. Ch. 242.

Though the decree was for payment of money, not for land, and the sequestration was for land at the time of the decree. Ca. Ch. 242.

A sequestration binds from the time of awarding it, not of the execution only. 1 Ver. 58.

If the suit be for land, a sequestration shall be granted, and also an injunction for the profits, directed to the sheriff, or other commissioners specially appointed. Vide Practical Register in Chancery, 329.

Where the suit was against a corporation for a debt due in their corporate capacity, (and against particular persons of the same corporation, against whom, upon demurrer, the bill was dismissed) and the corporation did not appear; upon an appeal to the lords in parliament from the decree for the dismissal and the answer, plea and demurrer of the particular persons (but the corporation, though summoned, did not appear) the lords ordered, that the bill as to the corporation should not be dismissed, that the court of chancery should award the usual process, and, if needful, a *distringas* (*q*), which should be served one month before the return, and if the corporation did not appear, or did not answer, that the bill should be taken *pro confesso*, and the court of chancery should make a decree accordingly. Ca. Ch. 206. Vide 1 Ver. 121, 2.

If again, the defendant appears, and afterwards does not answer, and all process of contempt goes; the bill shall be taken *pro confesso*, and a decree accordingly. R. 2 Ca. Ch. 173, 237. Vide 1 Ver. 247.

If process goes against one defendant to a sequestration (*r*) the plaintiff shall afterwards proceed against the others, though jointly concerned, without him who was sued to a sequestration, as when one defendant is outlawed at common law. 2 Ca. Ch. 139.

If after a sequestration the goods are embezzled by a stranger, he shall be examined for his contempt. 2 Ca. Ch. 82.

But a decree in chancery does not bind the right of the land, but only the person, if he does not obey it. 1 Rol. 373. l. 25. 4 Inst. 84.

And if the bill be against husband and wife, and the wife appears without the privity of the husband, the bill shall not be taken *pro confesso*. 1 Ver. 247.

And therefore the court cannot impose a fine for non-performance of a decree. R. 4 Inst. 84.

^p 1. One claiming title to an estate seized by sequestrators, cannot sue them at law. 9 Ves. 338.—2. But must (on motion) be examined *pro interesse suo* before the master.—3. And upon being reported to be clearly entitled, the court will discharge the sequestration as to him. For. Rom. 80.

(*q*) Subpœna to compel relators to pay a sum of money; on non-payment, a *distringas* issued. Dick. 73.

(*r*) 1. If a necessary defendant is in contempt, he must be prosecuted to a sequestration before the cause can be brought to a hearing against the others. Pre. Ch. 99.—2. Unless he has not appeared, and is out of the kingdom. 2 Atk. 510.

Nor decree damages for not delivering possession. R. 3 Bul. 34.

Yet there may be a decree for quieting the possession. R. 3 Bul. 34.

So a sequestration in mesne process determines (s) by the death of the party. 1 Ver. 58. (t) — if it be for a personal duty. 1 Ver. 166. — Otherwise, if it be after a decree. 1 Ver. 58. (u)

So a sequestration upon a bill, for a personal duty, does not avoid the dower of the wife, though the sequestration was before marriage. R. 1 Ver. 118.

So sequestrators (x) upon mesne process account for the profits, and retain only for satisfaction of the contempt. 1 Ver. 247, 8. (y)

(D 8.) Injunction. — The force of it.

An injunction (z) out of chancery cannot supersede the proceedings of B. R. Vide 37 H. 6. 13, 14.

And

(s) 1. The defendant, by clearing his contempt and paying the costs, may discharge the process. — 2. Unless in the case of a bill taken *pro confesso ad computandum*, when it will be kept on foot notwithstanding, to secure defendant's appearance, and taking the account before the master. 3 Atk. 468. — 3. So the appointment of a receiver in the room of sequestrators, discharges the sequestration. 3 Ves. 22. — 4. And a receiver having been appointed, with the usual directions for the tenants to attorn, and a tenant having been served with a writ of execution of the order, and arrested upon an attachment, and turned over to the Fleet, sequestration was refused. Dick. 798. — 5. See as to whether sequestration will be discharged as against real estate only. Dick. 106.

(t) 1. 3 Atk. 594. — 2. But it is revived with the suit. Dick. 132.

(u) If after a sequestration *nisi* against a peer or member of parliament for want of his answer, he answer, and the answer be reported insufficient, the plaintiff must move again for a sequestration *nisi*. Dick. 152.

(x) 1. It appears that commissioners under a writ of sequestration have authority to break open doors in discharge of their office, by comparison with the proceeding under a commission of rebellion. 2 Mer. 395. — 2. But *quære* as to their authority to seize books and papers, &c. belonging to a corporation. Ibid. — 3. Applications to empower sequestrators in mesne process to grant leases, have been refused. Dick. 638. — 4. It is a contempt to disturb their possession. 9 Ves. 336.

(y) 1. Sequestration upon mesne process may be executed. — 2. By making the tenants, in the case of landed property, attorn and pay rent to the sequestrators. 4 Ves. 738. Dick. 576. 622. — 3. And in the case of personalty, by directing a sale of so much as will cover the sequestrator's expences. 1 Ves. jun. 86. Dick. 711. — 4. But not of more, unless the goods are of a perishable nature. 3 Ves. 23. Dick. 335, 354. 3 B. C. C. 72. 2 Cox, 224. 1 Ves. j. 86. 2 V. & B. 184. Vide Amb. 421. 4 Ves. 735. — 5. And any sale must be by the court; nor can the sequestrators act of themselves. Bunb. 272. Barnard, 212. — 6. And the motion to sell must be on notice. 9 Ves. 208. — 7. Formerly it was held, that the sole object of a mesne sequestration was to forward the farther process of taking the bill *pro confesso*; and therefore any sale of personalty was refused. Amb. 421. 3 B. C. C. 72. 2 Dick. 622. Vide 1 Vern. 248. — 8. Unless for non-payment of money. 3 B. C. C. 362. — 9. They have been ordered to sell a leasehold estate. Dick. 107. Vide 3 Ves. 22. — 10. The sequestrators must account for what they receive, and bring the money into court; to be repaid to defendant on clearing his contempts, subject to their fees. — 11. Which they may claim, notwithstanding a considerable lapse of time since the issuing of the sequestration, provided they have made a return from time to time of what they have seized. 3 Atk. 594. — 12. The costs of the writ are taxed by the master; and the sequestrators are allowed sometimes a poundage, sometimes a gross sum. Hind. 140. Newl. 20.

(z) 1. An injunction is a prohibitory writ, issuing by the order and under the seal of a court of equity, specially prayed for by a bill in which the plaintiff's title is set forth, restraining a person from doing an act, other than a criminal act, which appears to be against equity or conscience. Mitf. 124. 6 Mod. 16. 1 Mad. T. 104, 105. — 2. It sometimes precedes, sometimes follows a decree. Ibid. — 3. And thence

And therefore, the court will give judgment, if it be prayed, notwithstanding an injunction. R. 22 Ed. 4. 37. b.

And if the injunction be not upon the attorney, he may pray it. Dict. 22 Ed. 4. 37. b.

But if a person, served (a) with an injunction, afterwards proceeds at common law, it is a contempt to the chancery, and he will be committed. Semb. 22 Ed. 4. 37. Yet there it was said per Hussey, that B. R. would grant a *habeas corpus*, and dismiss him.

It shall be served in the same manner as a subpoena. Vide Practical Register in Chancery, 197. (b)

And

thence is of two kinds, of which the one is the writ remedial amongst the most ordinary objects of which the following may be enumerated: to stay proceedings in courts of law, in the spiritual courts, the courts of admiralty, or in some other court of equity; to restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation; to restrain a trustee from assigning the legal estate, or from setting up a term of years; to restrain assignees from making a dividend; to prevent the removing out of the jurisdiction, marrying, or having any intercourse which the court disapproves of, with a ward; to restrain the commission of every species of waste to houses, mines, timber, or any other part of the inheritance; to prevent the infringement of patents, and the violation of copyright either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and by the various modes of interpleader, restraint upon multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation. These, however, are far from being all the instances in which this species of equitable interposition is obtained. It would indeed be difficult to enumerate them all, for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or the continuance of some act of the defendant, a court of equity administers it by means of the writ of injunction. Eden, Inj. 1, 2.—4. The other species of injunction is called the judicial writ, and issues subsequent to a decree: it is a direction to yield up, to quiet, or to continue the possession of lands, and is properly described as being in the nature of an execution. Eden, Inj. 2.—5. May be obtained at various stages of the suit, according to the circumstances. Ibid.—6. And if to stay waste, or other injuries of an equally urgent nature, upon filing the bill, and making affidavit of the urgency, it will be granted immediately to continue till answer put in, and further order made; and the mode of obtaining it is, in *term*, by motion (though before service of subpoena, and without notice to the adverse party); in *vacation*, or between the seals, by petition and affidavit, and certificate of the bill filed. Ibid.—7. On putting in his answer, the defendant may obtain an order *nisi* to dissolve the injunction; and the court, upon arguments drawn from considering the answer and affidavit together, will either dissolve or continue the injunction to the hearing; if no cause is shewn, then it is dissolved upon motion, and affidavit of service of the order. Ibid.

(a) 1. To proceed after notice of the order will be a breach of the injunction, without personal service of the injunction or order. 3 Atk. 564. 567. 2 V. & B. 349.—2. Therefore, though the act in violation was done before the injunction was sealed. 1 Dick. 116.—3. Hence where a defendant is in court when the order for an injunction is made, he is bound by it from that time, although it be not formally served till some time afterwards. 4 Price, 346. 3 Atk. 564. 567.—4. So where he is present in court during the motion, though absent when the order is pronounced. 14 Ves. 136. 18 Ves. 522.—5. Or having been served with a notice that the order has been made, does not deny, when the motion is made for his commitment, his belief that the order was made. 2 V. & B. 349.—6. But the plaintiff's lying by after order obtained, will preclude his furnishing a contempt in any of the above cases. 18 Ves. 522.—7. An injunction, when sealed at the next seal, operates from the order, not from the sealing. 3 Mad. 220.

(b) 1. The practice however seems to be, to serve only a copy of the writ upon the defendant personally, shewing him the original at the same time. Newl. 101.—2. And even personal service will, under circumstances, be dispensed with, and a service upon the

And if, after service it shall be disobeyed, all process for contempt issues, till the offender be taken and committed, upon an affidavit of his disobedience (*c*). Vide Practical Register in Chancery, 217.

And when he is taken he shall be committed (*d*), until he obeys, or gives security for his obedience, and shall not be heard in the principal case, until he obeys. Vide Practical Register in Chancery, 217.

If execution be taken out, after an injunction, the party shall make restitution for all damage that appears to be done to the plaintiff by his affidavit. 1 Ver. 207.

No one shall be restrained by an injunction, if he be not named.

But if it be served upon the attorney, &c. and the defendant afterwards proceeds himself, he will be in contempt.

And, if a man disobeys an injunction, he will be in contempt, though it was not regularly obtained. 2 Ca. Ch. 204.

And, though the party would not permit him to have a writ, to examine it with the copy served. Semb. 2 Ca. Ch. 204.

An injunction may be by parol, to one present in court. Vide Practical Register in Chancery, 197.

Or it shall be in writing. Vide Practical Register in Chancery, 197.

(D 9.) For staying proceedings at common law. (*e*)

Chancery (*f*) will (*g*) by injunction stay all proceedings (*h*) at (*i*) common law (*k*). Vide Practical Register in Chancery, 196.

Some-

the attorney substituted; as where the injunction is to restrain an action at law, and the plaintiff in that suit resides abroad. Ibid.—3. And where the defendant absconded, service at the last place of abode of defendant's wife, was ordered to be good service. 5 Ves. 147. 14 Ves. 205.

(*c*) 1. Upon motion after notice. — 2. The notice of motion being served personally. 6 Ves. 488.

(*d*) If the breach was in consequence of an error in judgment, rather than a wilful contempt, the court seldom proceeds to the extremity of a committal, but orders the party to pay the costs of the application. Newl. 101.

(*e*) It frequently happens that a person, in consequence of some circumstance of which judicial notice can only be taken in a court of equity, has an advantage in proceeding in a court of ordinary jurisdiction, which must make that court an instrument of injustice. There are also many cases in which the legal defence to a claim set up at law rests either exclusively, or in a great degree, within the knowledge of the party advancing the claim, by which means that defence can only be obtained through the assistance of a court of equity. As it is against conscience therefore that the party should in the one case make any use of the advantage of which he is thus inequitably possessed, or that he should in the other proceed in the assertion of his claim, without communicating the information, it has become one of the most ordinary modes of equitable interposition to afford relief by injunctions to stay proceedings at law. Eden, Inj. 3.

(*f*) 1. An injunction to stay proceedings in other courts may be obtained where there is a concurrent jurisdiction, or where something is suggested which affects the equitable right of the party in the proceedings in the other court. 1 Mad. T. 106. — 2. Where two courts have a concurrent jurisdiction of the same thing, that court is entitled to retain the suit in which it is commenced, and may enjoin any other court from proceeding in the suit. Ibid. — 3. It has however been decided, that if a bill is brought in the exchequer to foreclose, the defendant may file a bill in the court of chancery to redeem, and that a plea of the former suit cannot be sustained. 1 Vern. 220. — 4. It may be true that such plea is bad; but the court of exchequer perhaps might on application, have given the party relief by means of an injunction. 1 Mad. T. 106. — 5. So in those cases in which the court of chancery and the spiritual courts have a concurrent

Sometimes it stays trial (*l*), or, after a verdict, it stays judgment, or after judgment, execution, or if the execution hath been executed, it will stay the money in the hands of the sheriff (*m*). Vide (*n*) Practical Register in Chancery, 201, 2.

It

jurisdiction, the court of chancery will not, with some exceptions, hinder the spiritual court, being first possessed of the suit, from proceeding in it. Prec. Ch. 546. 1 Mad. T. 107.

(*g*) With this reservation, that an abuse of this jurisdiction will be guarded against with the nicest care. 2 Ves. 20.

(*h*) 1. But the process of a court of law upon an award made a rule of court under the statute cannot be stayed. 14 Vcs. 530. — 2. Though the rule might be otherwise, where the award was made in the course of a cause. Id. 532.

(*i*) 1. If a suit is instituted in the spiritual court for tithes, and a modus is set up as a defence, the court of chancery or exchequer will grant an injunction to stay proceedings in the spiritual court. 1 Fowler, 311. Vide Bunb. 176. — 2. But if a suit is there instituted for subtraction of tithes, and the defendant brings a bill to establish a modus, and on the bare suggestion of a modus, moves for an injunction to stay the proceedings in the ecclesiastical court, it will not be granted. 1 Mad. T. 107. — 3. If indeed the modus pleaded is admitted, the ecclesiastical court may then proceed upon the modus; but if denied, that court cannot proceed *propter triationis defectum*. 3. Atk. 627. — 4. But where a bill was brought in the ecclesiastical court to establish moduses, some of which the defendant admitted, and denied the rest and greatest part, the court of exchequer granted an injunction. Bunb. 176. — 5. Chancery will, on a bill filed, grant an injunction to the spiritual court to stay a husband's proceedings in that court, to obtain a legacy given to his wife. Prec. Ch. 548. Vide 1 Dick. 373. 1 Atk. 491. — 6. So where a suit is instituted in the spiritual court by a father for an infant's legacy. 3 Atk. 629. — 7. And in all cases of legacies where there is a trust, or as it has been said, any thing in the nature of a trust, chancery will grant an injunction. 1 Atk. 491. Vide 1 Dick. 98. 2 Dick. 769. — 8. But no injunction lies to stay proceedings in the admiralty court in a suit for the condemnation of a ship, on the ground that a note had been obtained by duress from the captain acknowledging the right of capture. 3 Atk. 350.

(*k*) 1. This injunction issues by order and under the seal of the court, not upon account of any supremacy which the court assumes over a court of law, but in respect of its jurisdiction as a court of equity, by which it controuls the party, and not the court from proceeding at law. 1 Atk. 630. — 2. The court of chancery in these cases admits the jurisdiction of the court of common law; and the ground on which it issues the injunction is, that the parties are making use of the jurisdiction contrary to equity and conscience. 1 Atk. 516. — 3. It is a general rule, illustrated by an abundance of cases, that whenever a party by fraud, accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice, a court of equity to prevent a manifest wrong will interpose by restraining the party whose conscience is thus bound from using the advantage he has improperly gained. Vide Mitf. 116.

(*l*) 1. Notwithstanding the common injunction allows the defendant, being in a condition to demand a plea, to proceed to trial; yet will the court extend the injunction to stay trial, upon the plaintiff's affidavit of belief, that the defendant's answer will afford a defence to the action at law. 16 Vcs. 223. — 2. Nor need the affidavit be particular respecting the anticipated discovery. 2 Dick. 729. 13 Ves. 323. — 3. Unless the defendant is abroad. Semb. 2 B. C. C. 640. — 4. An affidavit, however, that the plaintiff is advised and believes that he cannot safely go to trial without the answer, will not under any circumstances do. 16 Ves. 223. Vide cont. 2 Dick. 728. 8 Ves. 46. 16 Ves. 220. — 5. Such injunction too must always be bottomed upon the common injunction. 3 B. C. C. 87. 10 Ves. 450. — 6. And if moved for on the eve of the assizes, security for costs will be required. 13 Ves. 454.

(*m*) 1. It is an established rule, that where a verdict has been obtained at law, and the defendant in equity is resident abroad, and an injunction has been obtained for want of an answer, the court will, upon the application of the defendant before answer, order the money recovered by the verdict to be brought into court, or the injunction to be dissolved. 2 B. C. C. 14. Newl. 100. — 2. An affidavit, however, contradicting the material allegations in the plaintiff's bill, seems necessary. 2 B. C. C. 182.

(*n*) 1. 10 Vcs. 144. 3 B. C. C. 73. — 2. Or if partly on of a judgment debt has been by *n. fi. fa.*, it may issue to restrain the suing out of a *ca. ad. sa.* — 3. And where such

It shall (o) be granted to stop proceedings at common law, if the defendant (p) makes any delay; as, if he does not appear upon the subpoena, but an attachment is awarded (q), an injunction shall be granted until answer.

So, if the defendant be beyond the sea (r), or absconds, by which means he cannot be served. Vide Practical Register in Chancery, 198.

Or, if he prays time to make his answer.

Or, takes out a *dedimus potestatem* to take his answer in the country; and the defendant ought to take notice thereof, without service of the injunction. 1 Ver. 25. Vide Practical Register in Chancery, 200.

So, in the exchequer, if there are exceptions to the answer, and a material exception is discovered to the court, upon motion. Rules and Orders in Exchequer, 16. Rule 41.

And such an injunction shall not be restrained as to a prosecution of an under-sheriff for a contempt before. 1 Ver. 25.

If an injunction be upon a *dedimus*, before declaration, the plaintiff cannot declare, and shall not proceed against bail. Per King, 5 Geo. 2. 17.

If after declaration, he may proceed to judgment, and the execution only is stayed. 5 Geo. 2. 17. Vide 3 P. W. 146. 148. (s)

An injunction until answer (t) if it be not continued within fourteen days after answer made, and upon a certificate of the register, if there be no motion for the continuance of it (u) upon the merits of the

such injunctions are prayed by the bill, there is commonly a suggestion in it; such as that the complainant is not able, for some reasons therein stated, to make his defence in the other court, though he hath a good discharge in equity, or that the other party proceeds at law for a penalty, and threatens to make the complainant pay, or that the other court has not jurisdiction of the cause, which is cognizable in the court where he files his bill, or that the other court refuses some rightful advantage, or does injustice to him in the proceedings, or has not power to do him right. Prac. Reg. 232. 1 Mad. T. 110.

(o) 1. Injunctions are not of right, but discretionary. Amb. 99. — 2. And of late years have been allowed with greater liberality than formerly. 7 Ves. 307.

(p) 1. An injunction lies only against a party to the suit. — 2. And in the common case of an injunction after a decree, in the absence of a creditor, no one appearing for him as counsel, which might make a difference, it seems that he could not be proceeded against for a breach of the injunction. 7 Ves. 257, 258.

(q) 1. Or does not answer. — 2. Thus, to an amended bill, notwithstanding the original bill was answered, no injunction having been before obtained or applied for. 13 Ves. 323. 3 Barn. 332. — 3. But not after the dissolution (whether on the merits or for want of shewing cause), of an injunction previously obtained. 3 Atk. 694. 2 Ves. 19. 3 B. C. C. 425. — 4. Nor where an injunction has been refused upon the merits, when applied for on the coming in of the answer. Kinnear v. Lomax, Newl. 93.

(r) Where defendant is abroad, a special ground must be laid, proving the materiality of the discovery required. 2 B. C. C. 640.

(s) 1. If at the time of obtaining the injunction, the defendant is in a condition to demand a plea, the terms of the injunction allow him to call for a plea and proceed to trial, and for want of a plea to enter up judgment; and execution only is thereby stayed. — 2. Hence after judgment of assets *quando*, the plaintiff may, in spite of an injunction served, sue out a *sci. fa.* to inquire into the assets. 3 P. Wms. 146.

(t) 1. An injunction against more defendants than one will not be dissolved till all have answered. Barn. 354. — 2. Unless the defendants who have not answered are mere formal parties, or from whom no discovery can possibly be expected. Newl. 98. — 3. The allowance of a plea or demurrer to the whole bill dissolves the injunction, unless accompanied by an answer. Wy. P. R. 243.

(u) Vide supra.

cause (*x*), or the insufficiency of the answer (*y*), the same term (*z*) or the first seal afterwards (*a*), shall be dissolved without motion (*b*).

An injunction shall be granted for staying proceedings at law, until the hearing of the cause, when the action sued is for an old debt. Vide Practical Register in Chancery, 198, 202.

Or, the creditor and debtor are dead for a long time passed before the action commenced. Vide Practical Register in Chancery, 198.

So, when the defendant confesses that, which shews there was no cause of action, by his answer. Vide Practical Register in Chancery, 198.

Or, any record, or writing shews it. Vide Practical Register in Chancery, 198.

As, if the defendant sues execution upon a statute, contrary to the defeazance.

If he sues a bond, when he was the cause of the non-performance of the condition.

If he sues a bond with a great penalty, where the cause of the forfeiture was small.

If the cause of action accrued by fraud.

If the bond, or judgment was obtained by fraud.

If the consideration for the giving of a bond, judgment, &c. was never performed.

If the daughter of the obligee takes part of the money, which the obligor was paying; though she was the wife of the obligor, but parted from her husband. 1 Ch. R. 68.

So, when the defendant commences an action, after the bill exhibited, for a thing demanded in the bill.

So, if there be a suit depending in the spiritual court for the probate of a codicil, by which the obligation sued is discharged. R. Hard. 96.

(*x*) 1. The general rule in shewing cause against dissolving an injunction is, that no affidavit contradicting the answer, or asserting a fact not admitted by it, can be read, unless in the case of waste or infringement of a patent. 3 P. Wms. 255. — 2. Not therefore in the case of an injunction to prevent the negotiation of a bill of exchange. 9 Ves. 356.

(*y*) 1. So the having procured a reference of the answer for impertinence, may be shewn for cause against dissolving the injunction. 12 Ves. 18. — 2. The court, however, in the case of insufficiency, will order the plaintiff to procure the master's report upon the insufficiency in four days, in that of impertinence in a week, or in default thereof, the injunction to stand dissolved without further motion. 14 Ves. 534.

(*z*) 1. It often happens that when the day for shewing cause arrives, the plaintiff intending to insist that there is sufficient ground, from the facts in the answer, to support the injunction, is not ready to go into the discussion at that time; in this case it is of course to allow the plaintiff time, upon his undertaking to shew cause on the merits within a short time. Newl. 98. — 2. If however the motion to dissolve the injunction be made at the last seal after Trinity term, the plaintiff cannot have time till the next day of motions upon the usual undertaking to shew cause on the merits, but will be permitted to shew cause during the petitions. 5 Ves. 552.

(*a*) The plaintiff cannot shew exceptions for cause on the last seal after an issuable term, when the injunction stays trial. Newl. 97.

(*b*) 1. As to whether amending a bill after an injunction puts an end to the injunction, see 2 Dick. 536. 3 Anst. 65. 1 Dick. 255. Newl. 99, 100. — 2. It is usual, when an amendment is necessary, to apply for leave to amend, without prejudice to the injunction. Newl. 100. — 3. If exceptions are taken to the answer, it would be clearly irregular to move for the common order to amend till the exceptions are disposed of. 2 S. & L. 515.

So,

So, there shall be an order to stay proceedings against a defendant, who is an ambassador in the service of the king beyond sea, for a year and a day, unless he returns sooner. 2 Ver. 317.

But an injunction shall not be granted to stay proceedings at law upon a bare suggestion of the plaintiff by his bill.

Nor shall it be granted in the exchequer (c), but upon motion in court, and good cause. Rules and Orders in Exchequer, 16. Rule 41.

It shall not be granted or dissolved upon a petition. Ord. per. Cla. Rules and Orders of Chancery, 123. Vide Practical Register in Chancery, 203. (d)

It

(c) 1. The common injunction may in chancery be obtained upon motion or petition to the master of the rolls, and is to continue till answer or further order. — 2. And no affidavit of merits is required, unless where defendant is residing abroad, in which case the plaintiff must, when he moves for the injunction, support the material facts alleged in the bill, by an affidavit. — 3. And where defendant is abroad, if, after an answer is put in to the original bill, on which the plaintiff neither moved for an injunction, nor excepted, he amends the bill; the court will not grant an injunction for want of an answer to these amendments, though verified by affidavit, unless the plaintiff can satisfactorily account to the court why the new facts were not put in to the original bill. 11 Ves. 565. — 4. The common injunction does not extend to stay proceedings in the spiritual court, as it does to stay proceedings at law; so that whenever proceedings in the spiritual court are to be stayed, it is to be moved specially; and it seems that the same rule holds with respect to proceedings in the court of admiralty. 1 P. Wms. 300. Newl. 95.

(d) 1. It is directed both by lord Bacon's and lord Clarendon's orders, that no injunction for stay of suit should be granted or revived upon petition. Beames Ord. 12. 35. 214. Eden, Inj. 45. — 2. This, says Mr. Eden, seems to have been understood to be the practice at a much earlier period; the granting injunctions without bill previously filed having been one of the articles of impeachment against cardinal Wolsey. 4 Inst. 92. Eden, Inj. 45. — 3. There are indeed instances, he continues, subsequent to these orders, of injunctions granted in causes which had abated and not been revived. 1 Eq. Abr. 285. — 4. There is also a case where a manor with an advowson appendant had been mortgaged, and the church becoming vacant pending a suit to foreclose, in which the court granted an injunction to stay proceedings in a *quare impedit* brought by the mortgagee, though the defendant, the mortgagor, had not filed a bill. 2 Vern. 401. — 5. These, however, he observes, are precedents which would not be followed at present; and it is laid down in all the books as an established rule, that an injunction to stay proceedings at law will not be granted except upon bill filed. Wy. Pr. Reg. 231. Harr. Ch. Pr. 544. 1 Turn. Ch. Pr. 361. Eden, Inj. 46. — 6. Thus where a bill was filed by a seller for a specific performance, and an injunction was moved for to restrain the purchaser from proceeding at law to recover the deposit from the seller's attorney, to whom it was paid, the motion was refused with costs, the attorney not being a party to the suit. Brown v. Frost, Sugd. V. & P. 196. — 7. To this rule, however, there are certain exceptions: as where a decree has been made against an executor for the administration of assets, in which case the court will interpose by injunction at the application either of the executor or of the heir, or of the plaintiff in the cause, to restrain a creditor who is no party to the suit from proceeding at law. Eden, Inj. 31. — 8. Where plaintiff, having elected to proceed in equity, is restrained from proceeding in the cause at law, by the order which directs him to elect. Id. 34. — 9. Where after a decree the court, at the application of the defendant, restrains the plaintiff from proceeding at law for the same matter. Id. 36. — 10. By another exception, the necessity which formerly existed for the bail or the sheriff, if proceeded against by the plaintiff at law, to file a bill for an injunction, has been superseded, the courts have considered such proceeding as a breach of the injunction already granted. Eden, Inj. 46. 78. — 11. There are also instances where causes have been depending for other purposes in which applications have been made without bill filed, to stay proceedings either at law or in the ecclesiastical court; and upon the party undertaking to file a bill immediately, the court has stayed proceedings until such bill filed. Eden, Inj. 47. — 12. Thus where there was a decree which had been affirmed by the house of lords, declaring

It shall not be granted to stay or remove a suit by *certiorari*, until a bond be given that the bill is sufficient for that purpose, and it shall be proved within fourteen days after the writ of injunction delivered. Vide Practical Register in Chancery, 41.

And if not done, upon certificate of the neglect by the examiner, it shall be dismissed with costs, and a *procedendo* granted. Vide Practical Register in Chancery, 41, 2. Vide post, (2 O. 1.)

It shall not be granted after verdict usually, without bringing the money recovered into court. Vide Practical Register in Chancery, 202.

But before verdict, the money is not usually brought into court.

An injunction after a verdict shall be delivered into the hands of the chancellor himself, with the order upon which it issued. Vide Practical Register in Chancery, 197.

If money is brought into court, in order to have an injunction to a suit upon a bond, if it afterwards appears that the greatest part of the bond is paid, the money shall be re-delivered, on security to pay all that is due. Ch. R. 1.

It shall not be granted to an ejectment, though the lessor had five verdicts against his title in other ejectments. Eq. R. 2.

If the plaintiff after an injunction does not proceed for three years, (or as Shepherd says for three terms), it shall be dissolved *ex cursu*.

If it be obtained by misinformation, or abuse of the court, it shall be dismissed with costs.

that certain fee farm rents passed by a will, and directing the trustees to convey, the defendant, in order to obtain the opinion of a court of law, having afterwards distrained for non-payment of these rents, upon an application for an injunction, lord King observed, that though he thought himself not warranted in granting an injunction without bill, yet he would not endure to see the justice of the court questioned, and accordingly made an order to stay the proceedings at law till a bill was brought for an injunction. 2 Eq. Abr. 527. Eden, Inj. 47. — 13. Upon this authority, lord Hardwicke, in the cause of the Duke of Buckingham v. Duchess of Buckingham, in which the duchess, after a decree directing the trusts of the will of her late husband to be carried into effect (which had been affirmed in the house of lords), applied to the spiritual court, and cited the executors to prove the will *per testes*; whereupon Mr. Sheffield moved for an injunction to stay her proceedings in the ecclesiastical court: and lord Hardwicke said, that he did not think himself authorized to grant an injunction, which could not be done without a bill for that purpose; but as there appeared reason to stay the duchess's proceedings, he made the same order as in the case last cited. 2 Eq. Abr. 526. Eden, Inj. 47.—14. Lord Thurlow, under similar circumstances, refused an injunction. 1 Cox, 296. Eden, Inj. 48.—15. But it does not appear that the expedient of granting an injunction till bill filed was suggested to him. Eden, Inj. 48.—16. In that case there had been a decree for a specific performance of an agreement for a lease, which had been accordingly executed; the plaintiff however brought an action against the defendant to recover damages for the delay in performing the agreement. His lordship thought, that although the defendant would have been clearly entitled in a new suit, yet the decree having been wholly executed, the court would not make such an order in the original cause. Eden, Inj. 48.—17. In a recent case, however, in Ireland, where the precedents of lord King and lord Hardwicke were cited, this indulgence was carried to a considerable length. A bill for the specific performance of an agreement had been dismissed with costs, the plaintiff not having been able to make a good title. He then brought an action upon the agreement; and upon a motion made by the defendant to restrain him from proceeding at law, lord Manners granted an injunction, upon the defendant's undertaking forthwith to file a bill. 2 B. & B. 349. Eden, Inj. 48.

(D 10.) For

(D. 10.) For cause of privilege.

An injunction shall be granted to stay a suit, when the defendant is privileged to be sued in chancery. *Vide* *Prac. Reg. in Chan.* 216.

When money was lent to the defendant for a loan to the king. 1 Ch. R. 44.

When the plaintiff sues in the exchequer for the same cause, there shall be a rule that he shall make his election in which court he will proceed; if he chooses in the exchequer, the bill in chancery shall be dismissed; if in chancery, an injunction goes to the exchequer. 3 Ch. Rep. 2.

(D 11.) For staying waste.

By the common law, a prohibition went out of chancery against tenant by the curtesy, in dower, or as guardian, at the prayer of him who had the inheritance, to inhibit waste, and that before waste committed. 2 Inst. 299.

So, now, an injunction shall be granted upon an affidavit of waste committed, to inhibit any waste to be committed by tenant for life or years. *Vide* *Prac. Reg. in Chan.* 212, 213.

Or, to inhibit meadow or other pasture, not ploughed within twenty years, being ploughed. 1 Ch. R. 14. Ch. R. 189. *Vide* *Pract. Reg. in Chan.* 212.

So, to inhibit ancient inclosures being thrown down. *Vide* *Pract. Reg. in Chan.* 212.

Or, houses being pulled down. 2 Ca. Cha. 32. *Vide* *Pract. Reg. in Chan.* 212.

And it shall be granted also against tenant after possibility, &c. if he pulls down the seat, &c. 2 Ca. Cha. 32.

Or, against him, who in respect of a trust, &c. is not liable to an action of waste. *Ibid.*

[If lands are limited to A. for life, to trustees to preserve, &c. to first, &c. sons of A. in tail, remainder to B. for life, to his first, &c. sons in tail, reversion in fee to A., the court will grant injunction, and continue it till hearing, to stay A. cutting timber, at the suit of B., though he has not the immediate remainder, or at the suit of the trustees to preserve, &c. T. 1744, 3 Atkyns, 94.]

[If a father devises lands to his son and his heirs, but if he dies before twenty-one without issue, to his daughters, and directs in that case the lands to be sold, and the money divided among them; the court will grant injunction to prevent cutting timber till the son is of age; for till of age, he shall be considered as trustee of the inheritance for the benefit of the daughters. M. 1744, 3 Atkyns, 209.]

[The court will grant injunction to restrain tenant for life, without impeachment of waste, from cutting down trees in lines or avenues, or ridings in a park, whether planted or growing naturally, or trees not of a proper growth to be cut. P. 1745, 3 Atkyns, 215. See also 2 Vern. 738. 1 Term Rep. 56.]

[So, also, to restrain him from defacing the mansion-house; and not only so, but will oblige him to put it in the same plight in which he found it. *Prec. Ch.* 454.]

[The court will grant injunction to stay waste, at the suit of the ground-landlord against an under-lessee, who holds by lease from the original lessee. H. 1750, 3 Atkyns, 723.]

[Or, against tenant for life, at the suit of remainder-man in fee, though there is an intermediate remainder. *Ibid.*]

[Or, against mortgagee in fee in possession, for cutting timber, if he does not apply the money in sinking principal and interest. So, against a mortgagee for years. *Ibid.*]

[If tenant for life, without impeachment of waste, has cut timber, so as not to leave sufficient for repairs, the court will restrain him from cutting any more without leave of the court. T. 1749, 1 Vesey, 264.]

[The court will grant an injunction on a forcible entry, against commissioners of turnpike digging gravel in land leased for 21 years, and turned into a garden, whereof plaintiff has been three years in possession. M. 1748, 1 Vesey, 188.]

[To restrain rector from cutting timber in the church-yard till hearing, except for repairing parsonage-house, out-houses, chancel or pews. M. 1741, 2 Atkyns, 217.]

But it shall not be granted against him who has the inheritance, unless he be only a trustee, or in such like special case. *Vide* Pract. Reg. in Chan. 212.

Nor, against him who has an estate dispunishable of waste. *Ibid.*—Cont. if he pulls down the ancient and capital house, &c. Per Chancellor, 2 Ca. Ch. 32. 1 Sal. 161. 1 Ch. R. E. of Oxford, 10. *Vide* 1 Ver. 23.

Nor, against a lessee who had agreed to pay 20s. an acre *per ann.* increase of rent, if he ploughed a meadow. 2 Ver. 119.

Yet, if a lessee without impeachment of waste, about the end of his term, intends to cut down all the trees, &c., an injunction shall go; for that is contrary to the public good. R. 1 Rol. 380. l. 5.

But nobody can sue in equity against a lessee without impeachment of waste, for damages for pulling down houses, or cutting down trees. 1 Rol. 379. T.

Although he avers that there was an agreement that the party should not commit voluntary waste; for there cannot be an averment contrary to a deed. R. 1 Rol. 379. l. 40.

[In a special case on a particular right, the court will not grant injunction before answer. T. 1752, 2 Ves. 453.]

[An answer being insufficient, is not ground to continue injunction; it must be excepted to; and if reported insufficient, it may revive. T. 1752, 2 Vesey, 452.]

[The court will not grant an injunction to stay digging mines where defendant claims the inheritance, till the answer is come in, or defendant in default; but if he has only a term for years, or life, and the reversion is in plaintiff, will grant it before answer. P. 1747, 3 Atkyns, 496.]

[On motion to stay waste, a particular title must be shewn. 1 Brown, Ca. Ch. 57.]

[(D 12.) For restraining other acts.]

[If a sole right to a ferry appears by record, the court will grant injunction before answer, to restrain others from using ferry-boats there; but there must be full affidavits that plaintiffs keep up sufficient ferry-boats, or else not. Anon. T. 1750, 1 Vesey, 476.]

[The court will grant injunction to stop a building in London, which obstructs lights, till the right is tried at law, and order the scaffolds and ladders to be pulled down. T. 1750, 1 Vesey, 543.]

[Injunction to stay building must be on stopping ancient lights, for which there is prescription, or on agreement. T. 1752, 2 Vesey, 452.]

[If a nuisance is pulled down, the court will not give leave to re-erect, and quiet the possession till the hearing. H. 1750, 2 Vesey, 193.]

[If a defendant admits he has done waste, before filing the bill, though he swears he has done none since, the court will not dissolve the injunction. Anon. P. 1747, 3 Atkyns, 485.]

[An injunction may be granted to restrain defendants in an information by attorney-general at the relation, &c. from misapplying money, on their paying a *dedimus* to answer. M. 1728, Bunb. 258.]

[To restrain defendant from receiving S. S. annuities, on attachment for want of answer. M. 1730, Bunb. 289.]

[The court will not grant an injunction to restrain a person from committing a common trespass; but if it continues so long as to become a nuisance, it will. H. 1743, 3 Atkyns, 21.]

[The court grants injunction to restrain such nuisances only as are so at law, not such as fear (though reasonable) deems such; as, an inoculating hospital. Anon. M. 1752, 3 Atkyns, 750.]

[The court will not grant injunction to stay the use of a market, for there are remedies at law by *scire facias*, or action. And Q. after the right established at law. Anon. M. 1752, 2 Vesey, 414.]

(D 13.) For quieting possession.

An injunction shall be granted for quieting the possession, if the plaintiff be ousted of his possession, which he had at the time of the bill exhibited, and for three years before. 1 Ver. 156. Vide Pract. Reg. in Chan. 214.

And it hath been usual to insert, that he was in possession at the time of the bill, and for several years before, and that his interest was not determined, and to give bond in ten pounds for the truth of it.

But it shall not be granted, except it be of an house or land.

Not for rents received, &c.

Neither shall it be granted before the hearing of the cause, without an affidavit, that he was in possession at the time of the bill, and for three years before. Vide Pract. Reg. in Chan. 214.

[If a bill be filed for quieting plaintiff's possession, on affidavit of disturbance, an injunction may go, before a subpoena to answer is served. T. 1722, Bunb. 110.]

And it shall not extend to a possession which he claims from others.

Nor, shall it be granted upon the motion of a defendant, but only for him who has a bill in court, and was in possession for three years before, or after a determination of the cause for him upon a hearing of the merits. 1 Ver. 156.

Nor, will it prevent the defendant from proceeding at law, from making of leases, distraining for rent, &c. Vide Pract. Reg. in Chan. 215.

And if the plaintiff delays his suit, it shall be dissolved. Ibid.

[A perpetual injunction was decreed after two trials at bar in favour of plaintiff. N. B. This practice was introduced, that the right might be quieted in ejectments (where at law the party is always at liberty to bring a new one), as it was in real actions, where the verdict was final. M. 7 G. Str. 404.]

[A perpetual injunction was granted after five ejectments, three no suits, and two verdicts, and two bills in equity dismissed. H. 17th Bunb. 158.]

[If there have been suits in this court relating to a will of personal and real estate, and all parties have admitted the will and probate, and decrees thereupon made, this court will grant perpetual injunction to stay proceedings in the prerogative court, for controverting the will by a party to the suit in this court. M. 1739, 1 Atkyns, 628.]

[Though the court will decree specific performance of agreement, to settle boundaries of lands in America, yet it will not decree quiet enjoyment of them, which would occasion continual applications to this court for contempts, &c.; and this ought to be to the proper jurisdiction. P. 1750, 1 Vesey, 444.]

(D 14.) For staying printing, &c.

An injunction shall be granted to inhibit the defendant from printing books of common law, the sole privilege of which by patent is granted to the plaintiff, if the defendant be in contempt for not answering. 2 Ca. Ch. 67. 76. 93. Vide Trade, (B). [Amb. 694.]

[An injunction may be continued after the answer come in, on affidavits of the prejudice that would accrue on dissolving it. P. 1734, 3 P. W. 255.]

But an injunction to inhibit a ship trading to the East Indies was denied, though the owners were in contempt for not answering a bill by the East India Company, who have by patent the sole trade there. 2 Ca. Ch. 165. Denied till the validity of the patent was tried. 1 Ver. 127.

So, if the right be not settled, the court will not grant an injunction to the printing, before a trial. 1 Ver. 120. 275, 6.

An injunction was granted to inhibit the probate of a will for the personal estate, after a verdict, which had found it no will. R. Ca. Ch. 80.

[The st. 8 G. 2. c. 13. for encouragement of engraving, &c. is not confined to works of invention or history, but extends to any new print; as, a print of a building, prints of plants represented in a different manner than hitherto. M. 1740, 2 Atkyns, 93.]

[The court will grant an injunction for a collection of familiar letters, as well as other books. There is a distinction between letters wrote by a person, and wrote to him. T. 1741, 2 Atkyns, 342.]

[So, though the book has been pirated and printed in Ireland, and pretended to be only re-printed here. Ibid.]

[The court will not grant injunction to restrain one tradesman from using another's mark (as a card-maker from using the Mogul stamp.) M. 1742. 2 Atkyns, 484.]

(E) Bill in chancery.

(E 1.) When it shall be filed.

If the defendant appears at the return of the process, (or before noon, or the rising of the court upon the day after costs day, or when the process is returnable the last return in term, upon the first return in the next term), and the bill be not then filed, the defendant after entering appearance, upon the day after the return, (if the subpoena be returnable at a certain day, if at the common day of return, then upon day after the *quarto die post*), by his attorney shall give a rule for And now by the st. 4 & 5 Ann. 16. bills shall be filed before any subpoena, unless it be to stay waste or a suit at law.

And

And if the bill be not filed before noon of the next day, the defendant shall be discharged with costs to be taxed by a master. Vide Pract. Reg. in Chan. 26. 27.

It ought to be filed with the six clerk; and before that, it is not of record. Ord. per Cla. Rules and Orders of Chancery, 94. Vide Pract. Reg. in Chan. 28.

It shall be dated upon the day when it comes into the office. Ord. per Cla. Rules and Orders of Chancery, 93. Vide Pract. Reg. in Chan. 27.

So, by order, in the exchequer; and it shall be signed by the attorney. Vide Rules and Orders in Exchequer, 2. Rule 3.

No six clerk shall antedate any bill. Ord. per Cla. Rules and Orders of Chancery, 94. Vide Pract. Reg. in Chan. 27.

Nor, shall any under-clerk keep it, without delivering it to the six clerk, or his deputy in his absence, to be filed. Ord. per Cla. Rules and Orders in Chancery, 94. Vide Pract. Reg. in Chan. 27.

Nor, shall make any copy of the bill, or other pleading, till it be filed. Ord. per Cla. Rules and Orders of Chancery, 104. Vide Pract. Reg. in Chan. 28.

If there be a certiorari bill against the plaintiff in an inferior court, because the witnesses are out of the jurisdiction, and for other matters, a procedendo shall not go; for the plaintiff in the inferior court might have filed his bill in this. R. Ca. Ch. 31.

No bill shall be received, unless under the hand of counsel. Ord. per Cla. Vide Pract. Reg. in Chan. 25.

If his hand be counterfeited, the bill shall be dismissed. Vide Pract. Reg. in Chan. 25.

Counsel shall not sign any bill, unless it be written or perused by him, before the engrossment: and for his security, he will do well if he signs the paper-draught. Ord. per Cla. Rules and Orders of Chancery, 93. Vide Pract. Reg. in Chan. 25.

In the exchequer no bill shall be accepted, unless signed by the plaintiff's attorney, and allowed by a baron, except upon a suit by the attorney-general. Vide Rules and Orders in the Exchequer, 2. Rule 3.

No bill founded upon the loss of a deed or writing, &c. shall be received in chancery, without an affidavit that the deed, &c. is lost; for this loss entitles the court to jurisdiction; for otherwise the plaintiff might have a remedy at law. R. Ca. Ch. 231. viz. when the plaintiff prays not only a discovery, but also relief upon the deed. R. Ca. Ch. 11. But if he does not pray relief, an affidavit is not necessary. 1 Ver. 180. 247. 310. Vid. 3 Atk. 17. [2 Ves. jun. 461.]

And there is no need of an affidavit, where the loss of the deed is not that which entitles the court to jurisdiction. Ca. Ch. 231. 2 Mod. 173.

Nor, when the plaintiff only prays the discovery of a deed, or the producing it at a trial. R. Ca. Ch. 11. 2 Mod.

(E 2.) The matter of the bill.—Must have proper parties, &c.

*Quis, quid, coram quo, quo jure petatur, et a quo
Recte compositas quisque libellus habet.*

If all proper persons are not made parties to the bill, any other

be added upon motion. Vide Pract. Reg. in Chan. 29. 263. [Vide post, (2 X 6.)]

The king may sue there for equity; or, the chancellor himself; but he shall not make a decree in his own cause. R. 1 Rol. 373. L.

All concerned in the demand ought to be made parties; and therefore, if there be a bill against the executor of one obligor for discovery of assets, all the obligors shall be joined; for the charge ought to be equal. 2 Vent. 348.

[But in a bill against an executor, either by the creditors or legatees, it is not necessary to make the residuary legatee a party. 1 Brown. Ch. Rep. 303.]

[An objection for want of parties, ought regularly to be made on opening the proceedings, and before the merits are disclosed; but it frequently happens, that after a cause is gone into, and even thoroughly heard, yet the court is compelled to let it stand over, for want of parties. 3 Atkyns, 111.]

[If a debt is joint and several, each of the debtors must be brought before the court, because they are entitled to each other's assistance in taking the account, and likewise to contribution; so on specialty, heir and executor both must be parties. H. 1746, 3 Atkyns, 406.]

[But if there are principal and sureties, the principal cannot object that the sureties are not parties. Ibid.]

[And if bill is brought against principal and one surety, and it is admitted the other is dead insolvent, and no part of the debt paid, his representatives need not be parties. Ibid.]

[On an information by attorney general, at the relation, &c. proceedings shall not be stopt, because it is brought without the privity of one of the relators; but he may have his name struck out. M. 1728. Bunb. 258.]

[The attorney general need not be a party to a suit relating to a private charity, such as a voluntary society to provide for the members and their widows, by weekly contribution. Anon. T. 1745. 3 Atkyns, 277.]

If the suit be by one surety against another, for contribution, supposing that A., another surety, is dead insolvent, the executor of A. ought to be a party. R. Ch. Rep. 15.

[In a bill by the surety for an accountant of the Excise to be relieved against a *scire facias* on his bond, the commissioners of excise must be parties. M. 1730. Bunb. 291.]

[If there are two lessees, and one brings bill for apportionment of rent, the other lessee must join as plaintiff, or be made defendant, or the bill will be dismissed with costs. Str. 95.]

If the suit be by order of the vestry, all of the vestry shall be parties. Hard. 333.

If there be a covenant by a patentee to pay a rent to B., and the right of B. to the payment be dubious, in a bill by B. the attorney general ought to be a party. Hard. 181.

Otherwise, if the covenant be in affirmance of a prior right of B. R. d. 181.

If the suit be for a lunatic, the committees, as well as the lunatic, shall be parties. R. Ca. Ch. 19.

